# INDIAN CLAIMS COMMISSION PROCEEDINGS

(1998) 10 ICCP

---

**Reports**

Sturgeon Lake First Nation Inquiry
Red Deer Holdings Agricultural Lease Claim

Chippewa Tri-Council Inquiry
Chippewas of Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Rama First Nation
Collins Treaty Claim

Friends of the Michel Society Inquiry
1958 Enfranchisement Claim

Athabasca Chipewyan First Nation Inquiry
W.A.C. Bennett Dam and Damage to Indian Reserve 201 Claim

**Responses**

Responses of the Minister of Indian Affairs and Northern Development
to the Fort McKay First Nation Treaty Land Entitlement Inquiry
Kawacatoose First Nation Treaty Land Entitlement Inquiry

100-05000/

# INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

## THE INDIAN CLAIMS COMMISSION

(1998) 10 ICCP

### CO-CHAIRS

Daniel J. Bellegarde
P.E. James Prentice, QC

### COMMISSIONERS

Roger J. Augustine
Carole T. Corcoran

© Minister of Public Works and Government Services Canada 1998
Available in Canada through
your local bookseller
or by mail from
Canada Communication Group — Publishing
Ottawa, Canada K1A 0S9
Catalogue No. RC12-1-1998-10E
ISSN 1195-3586
ISBN 0-662-27413-X

The Indian Claims Commission Proceedings is a continuing series of official reports, background documents, articles, and comment published by the Indian Claims Commission (Canada).

For information about subscriptions and extra copies or to request the French edition, *Actes de la Commission des Revendications des Indiens*, please contact

Indian Claims Commission
427 Laurier Avenue West, Suite 400
Ottawa, Canada K1P 1A2
(613) 943-2737
Fax (613) 943-0157

Web site: www.indianclaims.ca

# CONTENTS

Letter from the Co-Chairs
v

Abbreviations
vii

## REPORTS

Sturgeon Lake First Nation Inquiry
Red Deer Holdings Agricultural Lease Claim
3

Chippewa Tri-Council Inquiry
Chippewas of Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Rama First Nation
Collins Treaty Claim
31

Friends of the Michel Society Inquiry
1958 Enfranchisement Claim
69

Athabasca Chipewyan First Nation Inquiry
W.A.C. Bennett Dam and Damage to Indian Reserve 201 Claim
117

## RESPONSES

Re: Fort McKay First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development,
to James Prentice and Carole Corcoran, Indian Claims Commission,
April 28, 1998
227

Re: Kawacatoose First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development,
to James Prentice and Roger Augustine,
Indian Claims Commission,
April 28, 1998
228

THE COMMISSIONERS

229

# FROM THE CO-CHAIRS

This is the tenth volume of the *Indian Claims Commission Proceedings* to be published and we are pleased to present it on behalf of the Commissioners and staff of the Indian Claims Commission. The volume includes four inquiry reports of the Commission and two letters from the Minister of Indian Affairs and Northern Development responding to the Commission's recommendations in completed inquiries.

The first two reports involve claims that were accepted by Canada for negotiation under the Specific Claims Policy without the need for a full inquiry into their merits. In the case of the Sturgeon Lake First Nation, Canada agreed to negotiate compensation in relation to the Red Deer Holdings agricultural lease claim. The other involved the Collins Treaty claim of the Chippewa Tri-Council, which represents the Chippewas of Beausoleil First Nation, the Chippewas of Rama First Nation, and the Chippewas of Georgina Island First Nation. Both of these reports illustrate the usefulness of the Commission's planning conferences as a method of resolving disputes by bringing representatives of the First Nation and Canada together to discuss the issues and the merits of the claim in an informal, open manner.

The third report involves an inquiry into whether the Friends of the Michel Society have standing under the Specific Claims Policy to submit several specific claims to Indian Affairs. The Society represents a number of descendants and former members of the Michel Band, which was completely enfranchised in 1958. The Society claimed that the 1958 enfranchisement was invalid and various land surrenders were improper, but Canada declined to consider the merits of these claims on the ground that only existing Indian bands can submit claims for consideration under the Specific Claims Policy. The Commission conducted an inquiry and released a report setting out its findings and recommendation in March 1998.

The final report published in this volume is the Commission's inquiry into the claim of the Athabasca Chipewyan First Nation involving the W.A.C. Bennett Dam and damage to Indian Reserve (IR) 201. This unique claim raises questions about the nature and scope of the Crown's fiduciary obligations to prevent, mitigate, or seek compensation on behalf of the Athabasca Chipewyan First Nation for damages caused to IR 201 and its traditional hunting, fishing, and trapping economy caused by the construction and operation of the W.A.C. Bennett Dam in British Columbia.

Also contained in this volume of the *Proceedings* are copies of two letters from the Minister of Indian Affairs and Northern Development with respect to the claims of two First Nations for negotiation under the Specific Claims Policy. These letters indicate that the Government of Canada accepts the Commission's recommendations in relation to its reports of inquiry into the treaty land entitlement claims of the Fort McKay First Nation and the Kawacatoose First Nation.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

# ABBREVIATIONS

| | |
|---|---|
| BCCA | British Columbia Court of Appeal |
| BCR | Band Council Resolution |
| BCSC | British Columbia Supreme Court |
| CA | Court of Appeal |
| CIL | Canadian Industries Limited |
| CNLR | Canadian Native Law Reporter |
| CPR | Canadian Patent Reporter |
| DIAND | Department of Indian Affairs and Northern Development |
| DLR | Dominion Law Reports |
| DLS | Dominion Land Surveyor |
| DREE | Department of Regional Economic Expansion |
| DSGIA | Deputy Superintendent General of Indian Affairs |
| Ex. CR | Exchequer Court of Canada Reports |
| FC | Canada Federal Court Reports |
| FCA | Federal Court Appeal Division |
| FCTD | Federal Court Trial Division |
| FTR | Federal Trial Reports |
| HC | Haute Cour |
| IAB | Indian Affairs Branch |
| ICC | Indian Claims Commission |
| ICCP | Indian Claims Commission Proceedings |
| IR | Indian Reserve |
| JHA | Journal of the House of Assembly |
| KB | Court of King's Bench |
| NA | National Archives of Canada |
| NBCA | New Brunswick Court of Appeal |

| | |
|---|---|
| NBWA | New Brunswick Water Authority |
| *NRTA* | *Natural Resources Transfer Agreement* |
| NR | National Reporter |
| NSCA | Nova Scotia Court of Appeal |
| NSR | Nova Scotia Reports |
| *NWPA* | *Navigable Waters Protection Act* |
| ONC | Office of Native Claims |
| OR | Ontario Reports |
| PADPG | Peace-Athabasca Delta Project Group |
| PFRA | Prairie Farm Rehabilitation Administration |
| QB | Court of Queen's Bench |
| QVIDA | Qu'Appelle Valley Indian Development Authority |
| RCAP | Royal Commission on Aboriginal Peoples |
| RDH | Red Deer Holdings Ltd |
| RPR | Real Property Reports |
| RSBC | Revised Statutes of British Columbia |
| RSC | Revised Statutes of Canada |
| RSNB | Revised Statutes of New Brunswick |
| RSUC | Revised Statutes of Upper Canada |
| SC | Statutes of Canada |
| SCC | Supreme Court of Canada |
| SCR | Canada Supreme Court Reports |
| SCW | Specific Claims West |
| SGIA | Superintendent General of Indian Affairs |
| SNB | Statutes of New Brunswick |
| TD | Trial Division |
| WWR | Western Weekly Reports |

# REPORTS

Sturgeon Lake First Nation Inquiry
Red Deer Holdings Agricultural Lease Claim
3

Chippewa Tri-Council Inquiry
Chippewas of Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Rama First Nation
Collins Treaty Claim
31

Friends of the Michel Society Inquiry
1958 Enfranchisement Claim
69

Athabasca Chipewyan First Nation Inquiry
W.A.C. Bennett Dam and Damage to
Indian Reserve 201 Claim
177

# Indian Claims Commission

## Sturgeon Lake First Nation Inquiry
## Red Deer Holdings Agricultural Lease Claim

### Panel

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

### Counsel

For the Sturgeon Lake First Nation
David C. Knoll

For the Government of Canada
Bruce Becker / Rosemary Irwin

To the Indian Claims Commission
Ron S. Maurice / Kathleen N. Lickers

**March 1998**

# CONTENTS

**PART I** ***INTRODUCTION*** 7
Background to the Claim 7
Mandate of the Indian Claims Commission 8
The Commission's Planning Conferences 9

**PART II** ***HISTORICAL BACKGROUND*** 12
Nature of the Claim 12
Map of Claim Area 14

**PART III** ***ISSUES*** 18

**PART IV** ***THE INQUIRY*** 19
The 15-Year Rule 21

**PART V** ***RECOMMENDATION*** 26

***APPENDICES*** 27
A Sturgeon Lake First Nation Inquiry 27
B Government of Canada's Acceptance of Claim 28

# PART I

## INTRODUCTION

### BACKGROUND TO THE CLAIM

In 1994, the Sturgeon Lake First Nation (First Nation), located near Prince Albert, Saskatchewan, submitted a claim to the Minister of Indian Affairs concerning a failed lease of reserve land to Red Deer Holdings Ltd (RDH) in 1982. The First Nation argued that the federal Crown breached its lawful obligations arising out of its administration of Indian lands by, among other things, permitting cropping and harvesting of part of the reserve without an agricultural permit, as required by the *Indian Act*. The result was an alleged loss to Sturgeon Lake of some $73,000.[1]

On October 23, 1995, the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) responded to the First Nation's claim. After internal consultations on the matter, the Specific Claims Branch informed Chief Earl Ermine that it would not consider the grievance under the Specific Claims Policy for the following reason:

> [Specific Claims West] concludes that it is not appropriate to process this matter as a specific claim. This decision reflects the fact that the events on which the grievance is based are recent. The Specific Claims process is intended to address longstanding historical grievances. . . .[2]

In response to a letter from Chief Ermine on November 1, 1995, requesting clarification from Canada on why the Specific Claims Policy was limited to "longstanding grievances," when no such limitation is expressly set out in the policy, the Director of Specific Claims West, Mr A.J. Gross, clarified Canada's position in a letter dated April 12, 1996:

1 Balfour Moss, Barristers & Solicitors, Sturgeon Lake Claim Submission ([Red Deer Holdings]Agricultural Lease), [1994] (hereinafter Sturgeon Lake Claim Submission).

2 Greg Morgan, Research Analyst, Specific Claims West, to Chief Earl Ermine and Council, Sturgeon Lake First Nation, October 23, 1995, DIAND file BW8260/SK360-C.1 (ICC Planning Conference Information Kit, tab 9).

> The practice of SCW [Specific Claims West] has been to interpret the Specific Claims Policy as intending the application of the program's resources to the processing of claims that are based on long standing historical grievances, rather than those that are recent in nature.[3]

Although Mr Gross emphasized that Canada had not rejected the grievance, the effect was essentially the same as a rejection, since Canada declined to consider the claim on its merits and the file was closed.

On May 21, 1996, Chief Ermine forwarded a Band Council Resolution from the Sturgeon Lake First Nation requesting that the Commission conduct an inquiry into the claim.[4]

## MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established as an interim body in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The mandate of the Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries and report on whether Canada properly rejected a specific claim:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[5]

This Policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept

3 A.J. Gross, Director, Specific Claims West, to Chief Earl Ermine and Council, Sturgeon Lake First Nation, April 12, 1996, DIAND file BW8260/SK360-C.3 (ICC Planning Conference Information Kit, tab 8).

4 Chief Earl Ermine, Sturgeon Lake First Nation, to Indian Claims Commission, May 21, 1996, and Band Council Resolution 1996-97/011, dated May 9, 1996, ICC file 2107-31-01 (ICC Planning Conference Information Kit, tab 7).

5 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[6]

The process outlined in *Outstanding Business* contemplates that a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The First Nation begins the process by submitting a clear and concise statement of claim, along with a comprehensive statement of the historical and factual background on which the claim is based. The claim is referred to the Specific Claims Branch (formerly Office of Native Claims), which usually conducts its own confirming research into a claim, makes research findings relative to the claim available to the claimant, and consults with the First Nation during the review process. After all the necessary information has been gathered, the facts and documents are referred by Specific Claims to the Department of Justice for advice on whether the federal government owes an outstanding lawful obligation to the First Nation. If Canada's review determines that the claim is valid, Specific Claims will offer to enter into compensation negotiations with the First Nation.

In this case, the Sturgeon Lake First Nation submitted a claim that was simply not considered by Canada under the Specific Claims Policy on the grounds that it was not a "longstanding grievance" and therefore fell outside the intended scope of the Policy. Although its claim had not been rejected on its merits, the First Nation took the position that the Commission could conduct an inquiry into the claim because Canada's refusal to consider it amounted to a rejection. In order to determine whether the Commission had a mandate to conduct an inquiry into the claim, representatives of the Sturgeon Lake First Nation and Canada were invited to attend a planning conference, convened and chaired by the Indian Claims Commission, on July 11, 1996.

## THE COMMISSION'S PLANNING CONFERENCES

The Commission has developed a unique inquiry process. During the course of an inquiry, representatives of the claimant First Nation and Canada are brought together for planning conferences that are usually chaired and facilitated by Commission Counsel or the Commission's Mediation and Legal Advisor. The purpose of the planning conference is to plan the inquiry process

6 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

jointly on a cooperative basis. Briefing material is prepared by the Commission and sent to the parties in advance to facilitate discussion of the issues. The main objectives of the planning conference are to identify the relevant historical and legal issues, to discuss openly the positions of the parties on the issues, to discuss which historical documents the parties intend to rely on, to determine whether parties intend to call elders, community members, or experts as witnesses, and to set time frames for the remaining stages of the inquiry. In cases like the present one, the planning conference also affords the parties an opportunity to meet and to discuss whether there are any threshold issues regarding the mandate of the Commission that require resolution before deciding how to proceed.

The planning conferences have been key to the success of the Commission because of the opportunities they afford the parties to resolve issues through open dialogue. This report into the Sturgeon Lake First Nation's claim further illustrates what can be achieved by Canada and First Nations in a process facilitated by a neutral third party. Throughout the discussions of parties at the planning conference held on July 11, 1996, and subsequent conference calls, the Department of Justice continued to maintain that the Specific Claims Policy was intended to address only long-standing historical claims and that the Department could not provide an opinion on the merits of the claim to its client, Indian Affairs, because 15 years had not elapsed since the claim had arisen. However, since this 15-year period would soon expire, Canada invited Sturgeon Lake to resubmit the claim when that mile post was reached. The First Nation agreed and resubmitted the claim in March 1997.[7] Canada agreed to expedite its legal review of the claim, and the claim was accepted for negotiation in August 1997.

Although the Sturgeon Lake First Nation has not yet expressed its intention to enter into negotiations with Canada, we are pleased that the constructive dialogue between the parties encouraged by the Commission led to their cooperation and to Canada's acceptance of this claim under the Specific Claims Policy. It was this constructive dialogue which avoided a full inquiry into the claim.

In view of Canada's decision to accept the claim for negotiation, we wish to emphasize that no further steps have been taken by the Commission to inquire into the First Nation's claim involving the Red Deer Holdings agricultural lease. Since the Commission did not complete its inquiry into the histor-

7 Chief Earl Ermine, Sturgeon Lake First Nation, to Belinda Cole, Specific Claims Branch, March 24, 1997, ICC file 2107-31-01.

ical and legal basis of the claim, we do not purport to make any findings of fact or law whatsoever in this report. Rather, this report contains a brief summary of the First Nation's claim and is intended only to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy. In the course of relating the events leading up to the acceptance of this claim, however, we wish to offer our own views on the policy rationale behind the "15-year rule" upon which Canada relied in refusing to consider the claim when it was initially submitted by the First Nation.

# PART II

## HISTORICAL BACKGROUND

This brief summary of the historical background for the claim is based almost entirely on the Sturgeon Lake Claim Submission and attached documents submitted to Specific Claims in 1994. This summary of events does not represent findings of fact on the part of the Commission. It is intended only to provide general background information on the nature of the First Nation's claim and to supply a context for the events leading up to Canada's acceptance for negotiation and a discussion of the policy behind the 15-year rule.

## NATURE OF THE CLAIM

The people of the Sturgeon Lake First Nation are descended from Cree Chief Ah-yah-tus-kum-ik-im-am[8] and his four head men (Oo-sahn-us-koo-nee-kik, Yay-yah-too-way, Loo-sou-am-ee-kwakn, and Nees-way-yak-ee-nah-koos) who signed Treaty 6 near Fort Carlton on August 23, 1876. According to the Department of Indian Affairs' records, the Band was usually referred to as William Twatt's Band after the Chief's English name. In about 1963, the name was changed to the Sturgeon Lake Band and, later, to the Sturgeon Lake First Nation.

In the fall of 1878, a 34.4-square-mile reserve was surveyed by E. Stewart at Sturgeon Lake, about 25 miles northwest of Prince Albert, in what is now the province of Saskatchewan. Identified as Sturgeon Lake Indian Reserve (IR) 101, it was confirmed by Order in Council PC 1151 on May 17, 1878, and removed from the operation of the *Dominion Lands Act* by Order in Council PC 1694 of June 12, 1893.[9]

For a period of time in the 1970s, all cultivated farmland on the Sturgeon Lake Reserve was used for the operation of a band-operated farm, except for

8 In the 1889 Order in Council confirming the reserve, this name is spelled "Ayoytus Cumicamin *alias* William Twatt" (Sturgeon Lake Claim Submission, document 2).

9 Sturgeon Lake Claim Submission, documents 2 and 3.

some small areas farmed by individual band members. During this time, no agricultural permits were issued to third parties. After the band farm ceased to operate, however, the Band Council began to lease reserve land to non-band members.[10]

In the spring of 1981, the Sturgeon Lake Band entered into a lease arrangement with a person for approximately 1600 acres of reserve land. When the "Lessee" declared bankruptcy in the fall of 1981, Red Deer Holdings (RDH), a limited company, paid up the arrears of $31,000 and offered to enter into a similar lease arrangement with the Band.[11] On May 21, 1982, and June 9, 1982, the Sturgeon Lake Band issued two Band Council Resolutions to request formally that Indian Affairs issue an agricultural permit to RDH under subsection 28(2) of the *Indian Act*[12] for a lease of reserve lands for the period January 1, 1982, to December 31, 1984, subject to payment of $45,000 on November 1, 1982, and subsequent payments of $22,500 on April 1 and November 1 of each year.[13]

Following a request for assistance from the Chief and Council of the Band to the District Office of Indian Affairs, the Regional Office prepared a draft agricultural permit between RDH, as permittee, and the Department of Indian Affairs and Northern Development, on behalf of Her Majesty the Queen in right of Canada.[14] The draft permit provided for the use of some 1813 acres of reserve land based on the terms and payment schedule set out in the Band Council Resolutions referred to above.

On June 11, 1982, the Head of Land Transactions for the Saskatchewan Regional Office of Indian Affairs asked the Prince Albert District Manager to review the Band Council Resolutions and draft permits with the Band Council and RDH and, if the agreement was satisfactory to both, to "have the document executed in the usual manner and the affidavit completed."[15] On July 7, 1982, Indian Affairs wrote RDH to ask that a representative of RDH contact the Prince Albert District office to sign the permits.[16] On August 18, 1982,

10 Sturgeon Lake Claim Submission, document 7.

11 Cherkewich, Pinel & Bockus, Barristers, Prince Albert, to Pat MacLean, Department of Justice, Saskatoon, December 1, 1982 (Sturgeon Lake Claim Submission, document 17).

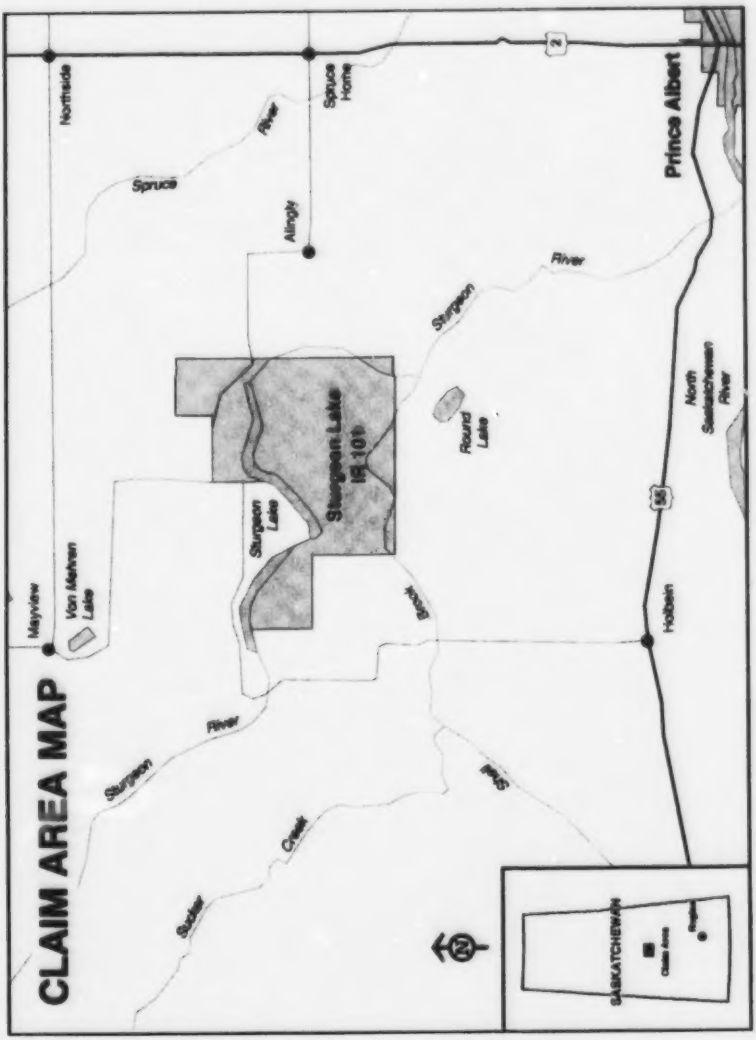
12 Subsection 28(2) of the *Indian Act*, RSC 1970, c. I-6, states that "[t]he Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."

13 Band Council Resolution, Sturgeon Lake Band Council, May 21, 1982, and Band Council Resolution, Sturgeon Lake Band Council, June 9, 1982 (Sturgeon Lake Claim Submission, document 8).

14 Sturgeon Lake Claim Submission, documents 7 and 10.

15 W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, to District Manager, Prince Albert District, June 11, 1982 (ICC Documents, p. 56).

16 A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Red Deer Holdings Ltd., Prince Albert, July 7, 1982 (Sturgeon Lake Claim Submission, document 11).


CLAIM AREA MAP
Mayview
Northside
Van Mahren Lake
Spruce River
Spruce Home
Allingly
Sturgeon Lake IR 101
Sturgeon Lake
Round Lake
Sturgeon River
Prince Albert
North Saskatchewan River
Hobbin
Sturgeon River
Sutter Creek
SASKATCHEWAN

departmental officials wrote another letter to RDH attempting to arrange for the permits to be signed.[17] The principal of RDH did not, however, make arrangements with Indian Affairs to sign the documents. Instead, RDH asked for an amendment to the proposed agreement to include a clause giving RDH the right to cancel the permit if it wished.[18]

In the meantime, RDH had already entered on reserve land and planted crops without an executed agricultural permit. At the end of October 1982, a representative of RDH met with the Band Council and asked to renegotiate the fall payment because frost had wiped out the rape crop and the company's insurance would not cover the loss.[19] Sturgeon Lake consulted its lawyer, who advised in a letter dated November 1, 1982, that it was the responsibility of Indian Affairs to collect the moneys owing by RDH:

> Since these leases are undertaken by the Department of Indian Affairs on behalf of the Band, it would be the Department of Indian Affairs' responsibility to deal with the Permittee with respect to payments received under the lease. The Band looks to the Department of Indian Affairs for monies under the lease and in turn, of course, Indian Affairs looks to the permit holder. On the face of the leases in question, the Band has no involvement whatsoever with the Permittee. If the Permittee does not make his payments that is a problem for the Department of Indian Affairs to resolve. Indian Affairs is accountable to the Band for the monies from the lease. If the monies are not forthcoming Indian Affairs must exercise its remedies under the permit.[20]

The Chief and Council therefore wrote to Indian Affairs on November 30, 1982, asking for assurances that the money due from Red Deer Holdings would be collected and deposited to the Band's trust account. In the letter, the Council clearly stated that it held the Department entirely responsible:

> [T]he Band Council is entitled to assume that the Dept. of Indian Affairs would act reasonably in protecting the interests of the Band in dealing with Reserve lands. It appears that Red Deer Holdings Ltd. was allowed to go on to the land and farm the land without a completed lease in place. This would appear to be an unforgivable error on the part of the Dept. of Indian Affairs. Furthermore, this problem created by the Dept. of Indian Affairs in allowing Red Deer Holdings Ltd. to begin farming without a written lease was compounded by the fact that there was still no lease in place

17 A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Red Deer Holdings Ltd., Prince Albert, August 18, 1982 (Sturgeon Lake Claim Submission, document 12).

18 A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Edith Owen, Acting Head, Land Transactions, Saskatchewan Region, September 1, 1982 (Sturgeon Lake Claim Submission, document 16).

19 Minutes of a Sturgeon Lake Band Council Meeting, October 25, 1982 (ICC Documents, p. 155).

20 Cherkewich, Pinel & Bockus, Barristers, to Chief and Council, Sturgeon Lake Band, November 1, 1982 (ICC Documents, p. 66).

> when the harvest was completed. As a result of the Dept. of Indian Affairs' inattention to this matter, Red Deer Holdings Ltd. was allowed to harvest and remove all the crops from land freeing Red Deer Holdings of any hold that the Dept. of Indian Affairs might normally have with respect to forcing a complete lease.[21]

According to the Band's legal counsel, the amount in arrears was $73,000 as of November 1, 1982. In an effort to enforce payment of the outstanding balance owed to the Band, their legal counsel informed the Department of Justice that information received by the Band and Indian Affairs confirmed that there was a pending Saskatchewan Crop Insurance payment to be paid to the principal of RDH for losses incurred during the 1982 crop year.[22]

At the request of Indian Affairs, the Department of Justice wrote to the principal of RDH on December 9, 1982, pressing for the execution of the permits and assignment of insurance moneys to the Band. These efforts, however, were not successful. In February 1983, the Department of Justice informed the First Nation that it could do nothing more; rather, it suggested that the Band itself should take action directly against RDH. The Band, however, reminded officials of the advice of its legal counsel that "the only action the Band can take is against the Dept. of Indian Affairs who in turn will have to take action against Red Deer Holdings Ltd.," and it demanded that the outstanding balance be paid by the Department of Indian Affairs.[23]

In March 1983, the Department of Justice agreed to commence legal action to recover the overdue rent, but there were difficulties over who should be named in the suit. The company did not hold any assets, and its principal was not a party to the failed agricultural permit. A payment of $20,000 was offered as a settlement by the principal of RDH on March 5, 1983, but the Chief and Council for Sturgeon Lake were not prepared to accept the offer at that time.[24] In October 1983, the Department of Justice decided to launch court action against both Red Deer Holdings Ltd and its principal. A statement of claim was filed in the Saskatchewan Court of Queen's Bench on November 25, 1983.[25] The principal filed a statement of

21 Chief and Council, Sturgeon Lake Band, to Wayne Gray, Department of Indian Affairs, Prince Albert, November 30, 1982 (ICC Documents, pp. 75-76).

22 Cherkewich, Pinel & Bockus, Barristers, Prince Albert, to Pat MacLean, Department of Justice Canada, December 1, 1982 (Sturgeon Lake Claim Submission, document 17).

23 H.A. Martyn, Management Consultant to the Chief and Council, Sturgeon Lake Band, to Clifford Supernault, District Manager, Department of Indian Affairs, Prince Albert, February 21, 1983 (ICC Documents, p. 115). The legal opinion was reinforced by one given by W. Roy Wellman, of Wellman & Andrews, Regina, to the Department of Indian Affairs, June 29, 1983 (ICC Documents, pp. 185-90)

24 Sturgeon Lake Claim Submission, document 7.

25 Statement of Claim, Attorney General of Canada vs. Red Deer Holdings Ltd., Saskatchewan Queen's Bench file no. 1335, November 25, 1983 (ICC Documents, pp. 227-32).

defence in March 1984, but RDH did not respond.[26] After conducting examinations for discovery in March 1985, legal counsel for the Department of Justice advised Indian Affairs: "In view of the results of the discovery I am very reluctant to proceed further lest we incur substantial costs as I feel there is no real probability of success."[27] Mr A.J. Gross, Director of Reserves and Trusts for the Saskatchewan Regional Office of Indian Affairs, concurred and recommended that Justice "cease all actions in this regard."[28]

When the litigation was abandoned, the Sturgeon Lake Band sought compensation from the Department of Indian Affairs for the principal sum of the lease arrears plus other related expenses.[29] The Band's request was turned down by the Regional Director General of Indian Affairs, Dan Goodleaf, on October 3, 1985:

> I have reviewed the records and appreciate the fact that your Band suffered financial losses as a result of farming operations undertaken by Red Deer Holdings. Based on the circumstances, however, the Department is not in a position to provide the compensation you request.[30]

This decision was reviewed again in October 1986, March 1987, and March 1988, with no change in the outcome.[31]

In 1994, the Sturgeon Lake First Nation submitted a specific claim to the Minister of Indian Affairs, alleging that the Crown breached its lawful obligations with respect to the administration of its reserve land by (1) failing to do a background check to determine what authority the principal had within RDH and what the financial position of the company was; (2) failing to obtain a personal guarantee from the principal of RDH; and (3) failing to have the agricultural permit signed by RDH.[32]

---

26 L.P. MacLean, Group Head, Civil Litigation, Department of Justice, to C. Chetty, Barrister, Prince Albert, June 26, 1984 (ICC Documents, p. 250). Statement of defence not included in documents provided to the ICC, but reference is made in the covering letter of Philip E. West, West-Wilcox, Barristers, Prince Albert, to L. Patton-MacLean, Department of Justice, March 19, 1984 (ICC Documents, p. 241)

27 L.P. MacLean, Counsel, Department of Justice, to W.P. Bernhardt, Manager, Lands, Department of Indian Affairs, Regina, May 16, 1985 (Sturgeon Lake Claim Submission, document 21).

28 A.J. Gross to L.P. MacLean, Department of Justice, July 4, 1985 (ICC Documents, p. 263).

29 Band Council Resolution 1985-86/019, c. September 17, 1985 (Sturgeon Lake Claim Submission, document 23).

30 Dan E. Goodleaf, Regional Director General, Saskatchewan Region, to Chief Wesley Daniels, Sturgeon Lake Band, October 3, 1985 (Sturgeon Lake Claim Submission, document 24).

31 H.J. Ryan, Acting Director, Lands Directorate, Department of Indian Affairs, to Chief Wesley Daniels, Sturgeon Lake Band, April 2, 1986 (ICC Documents, p. 283); Kenneth C. Kirby, Director of Operations, Regina, to Chief Daniels, March 16, 1987 (ICC Documents, p. 286); and W.F. Bernhardt memo to Dan Goodleaf, March 8, 1988 (ICC Documents, pp. 291-94).

32 Sturgeon Lake Claim Submission, pp. 3-4.

# PART III

## THE ISSUES

The essential issues identified by the Sturgeon Lake First Nation for the purposes of an inquiry by the Indian Claims Commission were:

1 Does the Department of Indian Affairs' Specific Claims Policy apply only to "historical grievances"?

2 Did Canada breach its lawful obligation by failing to comply with provisions of the *Indian Act* in leasing Sturgeon Lake reserve lands around 1982?[33]

Since Canada has accepted the claim for negotiation, it is not strictly necessary for the Commission to address either question. In this instance, however, the first issue was avoided only because the First Nation decided to put its request for an inquiry into abeyance and resubmit the claim after the 15-year time limit imposed by Canada had lapsed. In our view, this does not resolve the underlying problem, and we intend to address what we consider to be the real question in this matter:

Is there a valid justification for Canada's refusal to address specific claims until 15 years have passed since the claim arose?

33 Chief Earl Ermine, Sturgeon Lake First Nation, to the Indian Claims Commission, May 21, 1996, and Band Council Resolution 1996/97-011, dated May 9, 1996, ICC file 2107-31-1

# PART IV

## THE INQUIRY

On July 11, 1996, the Indian Claims Commission convened and chaired a planning conference in Ottawa with representatives of the Sturgeon Lake First Nation and Canada in attendance. As a preliminary issue, Bruce Becker, counsel for Canada, advised that he would need to seek instructions from his client, Indian Affairs, about challenging the Commission's mandate to inquire into the agricultural lease claim because it had never been reviewed by the Specific Claims Branch and had not, therefore, been rejected. Mr Becker agreed, however, with the suggestion of Commission Counsel that all efforts should be made to explore whether the claim could be settled without the need for a full inquiry. Given that the First Nation was claiming compensation for lost revenues of only approximately $73,000 in 1982, it might be more cost-effective for Canada to attempt to resolve this as a "fast-track" claim (an expedited option under the Specific Claims Policy to settle claims of $500,000 or less) rather than opposing the claim and requiring all parties, including the Commission, to invest the considerable time and expense involved in an inquiry. In view of the circumstances, all parties recognized that the cost of conducting an inquiry could ultimately exceed the costs of a settlement. Mr Becker agreed to seek instructions on whether Indian Affairs was willing to review the claim and submit it to the Department of Justice for an opinion on whether an outstanding lawful obligation was owed to the First Nation. The parties agreed that the Commission's inquiry process (i.e., the staff visit, community session, written and oral submissions) would be held in abeyance pending a review of the claim.[34]

A conference call involving representatives of Canada, the First Nation, and the Commission was arranged on August 14, 1996. During the conference call, Beverly Lajoie, Senior Claims Officer with the Specific Claims Branch,

34 Summary, ICC Planning Conference, Sturgeon Lake First Nation Agricultural Lease, Ottawa, Ontario, July 11, 1996, and David Knoll, Davis & Company, to Kathleen Lickers, Indian Claims Commission, July 26, 1996, ICC file 2107-31-01.

advised that the Sturgeon Lake First Nation's claim relating to the agricultural lease would be considered under the Specific Claims Policy as a fast-track claim. Canada would not undertake further research, but departmental files would be reviewed and any documents added to those included in the claim submission would be provided to the First Nation and the Commission. Assuming that the review could be completed by the end of October, a conference call was scheduled for November 1, 1996, to discuss Canada's review of the claim. Ms Lajoie confirmed this commitment in a letter to Chief Earl Ermine dated August 15, 1996, advising that Justice would be asked "whether, based on all of the material assembled, the facts give rise to an outstanding lawful obligation under the Specific Claims Policy."[35] On October 7, 1996, Ms Lajoie sent Chief Ermine the document collection and index for this claim and informed him that the file had been sent to the Department of Justice.[36]

A conference call was held on November 1, 1996, but Canada advised that it had not completed its legal review of the claim. Since it was not likely to be complete before the end of November, another conference call was arranged for December 6, 1996. On that date, Ms Belinda Cole, Specific Claims Advisor, explained that Indian Affairs was willing to recommend that this claim be accepted for negotiation, but that this recommendation would have to be deferred until March 1997 to comply with the Department's 15-year rule. The Sturgeon Lake First Nation agreed, therefore, to resubmit the claim after March 1, 1997, on the understanding that Indian Affairs would consider the claim "expeditiously, in light of the work done to date by the SLRN [Sturgeon Lake First Nation], the Department of Justice and SCB [Specific Claims Branch]."[37] Although the parties had agreed that an inquiry was no longer required, the First Nation requested that the Commission remain involved to monitor the progress of this claim.[38]

On March 24, 1997, Chief Ermine wrote to Indian Affairs to "request that the Red Deer Holdings claim submission and supporting materials be resubmitted as a specific claim."[39] The file, with a recommendation for acceptance,

35 Beverly A. Lajoie, Senior Claims Officer, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, August 15, 1996, and Kathleen Lickers, note to file, August 15, 1996, ICC file 2107-31-01.

36 Beverly A. Lajoie, Senior Claims Officer, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, October 7, 1996, ICC file 2107-31-01.

37 Belinda Cole, Specific Claims Advisor, Specific Claims Branch, to David Knoll, Davis & Company, and Kathleen Lickers, Indian Claims Commission, December 17, 1996; Kathleen Lickers to David Knoll and Belinda Cole, December 11, 1996, ICC file 21070-31-01.

38 Kathleen Lickers, note to file, December 6, 1996, ICC file 2107-31-01.

39 Chief Earl Ermine, Sturgeon Lake First Nation, to Belinda Cole, Specific Claims Branch, March 24, 1997, ICC file 2107-31-01.

was immediately transferred to the Department of Indian Affairs Negotiations Directorate for review and acknowledgement.[40] On August 28, 1997, Michel Roy, Director General of the Specific Claims Branch, wrote to Chief Ermine accepting the claim for negotiation under the fast-track process:

> On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer to accept for negotiation of a settlement the Sturgeon Lake First Nation specific claim concerning the Red Deer Holdings Ltd. agricultural lease mismanagement. The claim is to be addressed through the fast-track process. Fast-track claims are claims in which compensation is restricted to a monetary limit of $500,000 or less.
>
> For the purposes of negotiations, Canada accepts that the First Nation has sufficiently established that Canada has an outstanding lawful obligation, within the meaning of the Specific Claims Policy, to provide compensation for the failure to pursue properly the defaulted amounts on the Red Deer Holdings Ltd. agricultural leases.[41]

At the time of writing this report, the Sturgeon Lake First Nation had not yet confirmed its intention to enter into negotiations with Canada on this basis, but it is hoped that Mr Roy's letter will provide a foundation for a negotiated settlement between the parties.

## THE 15-YEAR RULE

We wish now to consider the principal issue identified in this inquiry, which is restated below:

Is there a valid justification for Canada's refusal to address specific claims until 15 years have passed since the claim arose?

It is significant to note that Canada took the position in this inquiry that it had not rejected the Sturgeon Lake First Nation's claim regarding mismanagement of the Red Deer Holding agricultural lease. Instead, it simply refused to review it under the Specific Claims Policy until 15 years after the claim first arose. In response to a request from the Commission's staff for clarification of Canada's 15-year rule, the following explanation was received from Michel Roy, Director General of Specific Claims, on November 21, 1997:

40 Ian D. Gray, Senior Negotiator, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, April 11, 1997, ICC file 2107-31-01.

41 Michel Roy, Director General, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, August 28, 1997, ICC file 2107-31-01.

> The Specific Claims Policy was introduced to address First Nations' historic grievances relating to a variety of circumstances outlined in the policy. As a result, Canada applies this fifteen year rule of thumb, considering only those claims which arise from breaches of the Crown's lawful obligation which occurred at least 15 years before the date a claim is submitted.
>
> This fifteen year restriction was approved by the government as part of the Specific Claims Policy. However, the Specific Claims Policy does not make specific reference to this restriction, but includes, instead, only general statements that the Policy was designed to address historic grievances.[42]

We have serious reservations about the policy rationale behind the 15-year rule. Mr Roy's explanation seems to imply that Canada's 15-year rule is likely based on a cabinet directive or decision by the government that the policy was intended to address only "long standing historical grievances." Regardless of its origin, what is important is that no such rule or policy is expressed in the Specific Claims Policy as set out in *Outstanding Business*. The letter states that the Specific Claims Policy was "introduced to address First Nations' historic grievances" and, while acknowledging the absence of any reference to a 15-year restriction in *Outstanding Business*, Indian Affairs maintains that it contains "general statements that the Policy was designed to address historic grievances."

We have reviewed the text of *Outstanding Business* and agree with Mr Roy that there is no express reference to a 15-year rule. We did find one instance of the use of the term "longstanding grievances":

> Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches.[43]

Later, in the guidelines for the submission and assessment of specific claims, the Policy refers to only two factors relating to time:

> 5) The government will not refuse to negotiate claims on the grounds that they are submitted too late (statutes of limitation) or because the claimants have waited too long to present their claims (doctrine of laches).
>
> . . .

42 Michel Roy, Director General, Specific Claims Branch, to Donna Gordon, Research Director, Indian Claims Commission, November 21, 1997, ICC file 2107-31-01.

43 *Outstanding Business*, 21.

8) No claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.[44]

There is no reference to any waiting period and there is no express statement that only "historic grievances" will be addressed.

To the extent that there are general references in the policy to "historic grievances" or similar terminology, we disagree that these references have any real bearing on the scope of the Policy. In our view, *Outstanding Business* was intended to address specific claims that are "based on lawful obligations" or which "disclose an outstanding 'lawful obligation'" and which "relate to the administration of land and other Indian assets and the fulfillment of Indian treaties."[45] The definition of "lawful obligation" in *Outstanding Business*, set out below, contains no reference to any time limits:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims which fall under the heading "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[46]

If Canada intended to impose a 15-year waiting period before First Nations could bring claims under this Policy, it could have stated this intention in clear and express terms in *Outstanding Business*. The fact that Canada omit-

44 *Outstanding Business*, 30.
45 *Outstanding Business*, 7, 13, 19, 20.
46 *Outstanding Business*, 20.

ted such an express reference in *Outstanding Business* should not prejudice the legitimate claims of First Nations, which may have no other recourse but to bring a claim under this Policy for alleged breaches of the Crown's legal and equitable obligations.

While Canada's interpretation of the Policy is not borne out by a careful examination of *Outstanding Business*, we also have concerns about the underlying rationale of imposing a 15-year waiting period. In our view, a fair reading of *Outstanding Business* suggests that there is no room for such a rule in the Policy because it was intended to address all outstanding claims "between Indians and government which for the sake of justice, equity and prosperity now must be settled *without further delay*."[47] Indeed, the Policy expressly acknowledges that delay in the resolution of claims has long been a concern to both the government and First Nations:

> It is clear however that the rate at which specific claims have been resolved does not correspond with the expectations of the Government of Canada or the Indian claimants. This fact plus the estimated hundreds of other claims which are being withheld pending clarification and resolution of the existing claims policy underscores the seriousness with which the government views the current situation and has led to the reevaluation of its policy on specific claims.[48]

A 15-year waiting period is wholly at odds with the stated objective of *Outstanding Business*.

The need to deal with the First Nations' claims expeditiously is as compelling in 1998 as it was in 1982 when Canada published *Outstanding Business*. All indications since 1982 have been that the number of specific claims has increased and will continue to do so. According to a recent study completed by an independent consultant for the Government of Canada and the Assembly of First Nations, approximately 840 claims have been submitted to Specific Claims Branch for consideration, and only 174 have been settled to date.[49] There are a further unspecified number of claims currently backlogged in the process, which have yet to be reviewed. The reason for the backlog can be attributed, at least in part, to the fact that the government has not

47 John C. Munro, Foreword, *Outstanding Business*, 3 (emphasis added).

48 *Outstanding Business*, 14.

49 These figures were obtained from a draft study completed by Fiscal Realities entitled "Assessing the Fiscal Impacts of Settling Specific Claims," presented to the Assembly of First Nations and the Department of Indian Affairs and Northern Development (final draft dated January 21, 1998). The Commission cannot confirm whether these figures represent an accurate picture of the number of claims currently in the specific claims process, but it is expected that the Department of Indian Affairs will be presenting updated statistics on the status of specific claims in April 1998.

allocated sufficient resources to assess the validity of claims or to respond to the Commission's reports and recommendations.

An arbitrary waiting period before a claim can be reviewed under the Policy is counterproductive to the settlement process. Imposing such a delay is tantamount to asking the First Nation to assume the risk that first-hand knowledge, salient evidence, and important documents may be lost. A First Nation claiming an outstanding legal obligation under the Policy would have no other option but to pursue litigation. This option would increase both the time and costs dramatically. It is directly contrary to the objective of ***Outstanding Business***, which was specifically designed to avoid unnecessary litigation.

Finally, we point out that the Policy itself was introduced to foster a "new approach" in addressing First Nations' claims. In Part Two of ***Outstanding Business***, under the heading "The Policy: A Renewed Approach to Settling Specific Claims," it states:

> In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[50]

An arbitrary 15-year rule is inconsistent with a "liberal approach" to claims resolution and with the goals of "justice, equity and prosperity" the Policy was intended to achieve.

50 *Outstanding Business*, 19.

# PART V

## RECOMMENDATION

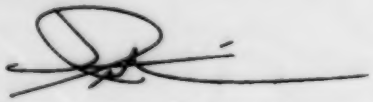
After a careful consideration of the intended purpose of the Specific Claims Policy as presented in *Outstanding Business*, the Commission makes the following recommendation:

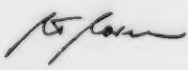
---

**That Canada withdraw the "15-year rule" and notify any First Nation claimants whose claims have been refused for consideration on this basis.**

---

FOR THE INDIAN CLAIMS COMMISSION





P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Dated this 5th day of March, 1998

# APPENDIX A

## STURGEON LAKE FIRST NATION INQUIRY

| | | |
|---|---|---|
| 1 | **Planning conference** | July 11, 1996 |
| 2 | **Government of Canada's acceptance of claim** | August 28, 1997 |

# APPENDIX B

## GOVERNMENT OF CANADA'S ACCEPTANCE OF CLAIM

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

WITHOUT PREJUDICE

APR 28 1987

Chief Earl Ermine
Sturgeon Lake First Nation
Comp. 8, Site 12, R.R. #1
SHELLBROOK, SK S0J 2E0

Dear Chief Ermine:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer to accept for negotiation of a settlement the Sturgeon Lake First Nation specific claim concerning the Red Deer Holdings Ltd. agricultural lease mismanagement. The claim is to be addressed through the fast-track process. Fast-track claims are claims in which compensation is restricted to a monetary limit $500,000 or less.

For the purposes of negotiations, Canada accepts that the First Nation has sufficiently established that Canada has an outstanding lawful obligation, within the meaning of the Specific Claims Policy, to provide compensation for the failure to pursue properly the defaulted amounts on the Red Deer Holdings Ltd. agricultural leases.

The settlement will be in accordance with Canada's Specific Claims Policy, as explained in the booklet "Outstanding Business." As for the elements of the claim accepted for negotiations, compensation will be based on criteria 1 and 10, which are explained in the booklet. The value of the compensation will take into account all the relevant criteria. No individual criterion will be viewed in isolation.

The steps of the fast-track claim process which will follow include agreement on compensation, the development of a settlement agreement, concluding and ratifying the agreement and finally, implementing it.

Throughout the process, Canada's files and documentation are subject to the Access to Information and Privacy legislation in force.

.../2

Canada

All negotiations will be conducted on a "without prejudice" basis. Canada and the First Nation acknowledge that all communications, oral, written, formal or informal are made with the intention of encouraging settlement of the dispute between the parties only and are not intended to constitute admissions of fact or liability by any party.

The acceptance of the claim for negotiation is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a formal settlement is reached, Canada will require from the First Nation a final and formal release on this claim.

A federal negotiator, Mr. Ian D. Gray has been designated to work with you on resolving this claim. I send my best wishes and am confident that a fair settlement can be reached.

Yours truly,

Michel Roy
Director General
Specific Claims Branch

# Indian Claims Commission

## Chippewa Tri-Council Inquiry

Chippewas of Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Rama First Nation

## Collins Treaty Claim

### Panel

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger Augustine

### Counsel

For the Chippewa Tri-Council
Alan Pratt

For the Government of Canada
François Daigle / Laurie Klee

To the Indian Claims Commission
Ron S. Maurice / Ralph Keesickquayash

**March 1998**

# CONTENTS

**PART I** ***INTRODUCTION*** 35
Background to the Claim 35
Mandate of the Indian Claims Commission 38
The Commission's Planning Conferences 40

**PART II** ***HISTORICAL BACKGROUND*** 42
Early History of the Lake Simcoe and Lake Huron Area 42
The Royal Proclamation of 1763 43
The Collins Treaty 44
The Williams Treaty 49

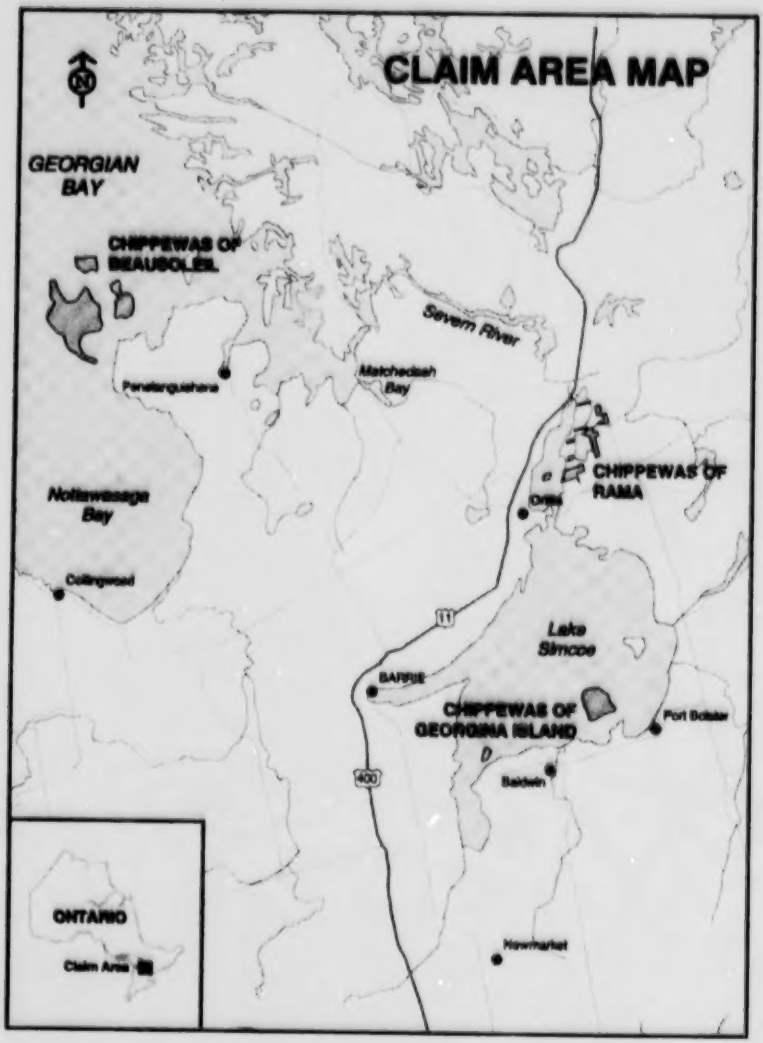
**PART III** ***ISSUES*** 51

**PART IV** ***THE INQUIRY*** 53
The Planning Conferences, April 1994 – October 1997 53

**PART V** ***CONCLUSION*** 59

***APPENDICES*** 60
A Chippewa Tri-Council Inquiry 60
B Government of Canada's Offer to Accept Claim 61
C Chippewa Tri-Council Confirmation of Acceptance in Principle 67

***MAPS***
1 Map of Claim Area 34
2 Communication Route from Toronto to Matchidash Bay through Lake La Clie, 1785 37
3 River Trent Navigation 45


CLAIM AREA MAP
GEORGIAN BAY
CHIPPEWAS OF BEAUSOLEIL
Severn River
Matchedash Bay
Penetanguishene
Nottawasaga Bay
Collingwood
CHIPPEWAS OF RAMA
Orillia
Lake Simcoe
BARRIE
CHIPPEWAS OF GEORGINA ISLAND
Port Bolster
Baldwin
Newmarket
ONTARIO
Claim Area

# PART I

## INTRODUCTION

### BACKGROUND TO THE CLAIM

On June 10, 1986, the Chippewas of Beausoleil First Nation, the Chippewas of Rama First Nation, and the Chippewas of Georgina Island First Nation, also known as the Chippewa Tri-Council, submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND).[1] The original claim submitted by the Chippewa Tri-Council was based on the traditional use and occupation of certain lands in the province of Ontario by the Chippewa people. The lands at issue were roughly described in the statement of claim as falling within the following townships in the County of Simcoe: Oro, Medonte, Orillia, Matchedash, and Tay.[2]

The Chippewa Tri-Council alleged that in 1785 John Collins, the Deputy Surveyor General, and Captain William Crawford, of the Indian Department, entered into a treaty with the Chippewas without the proper authority to do so. The Chippewa Tri-Council alleged that the lands included in the Collins Treaty in 1785 were never properly surrendered, nor was compensation paid by the federal government for those lands. The specific area involved communication routes between Lake Simcoe and Georgian Bay and was described in 1795 as "[o]ne mile on each side of the foot path from the Narrows at Lake Simcoe to Matchidash Bay, with three Miles and a half Square, at each end of said Road or foot path . . . also one mile on each Side of the River which empties out of Lake Simcoe into Matchidash Bay." The claim area is depicted on Maps 1 and 2, found on pages 34 and 37, respectively. Map 1 is a modern representation of the claim area. Map 2 is a 1785 map of the communication route from Toronto to Matchidash Bay through Lac La Clie (now Lake Simcoe). This map depicts both the footpath from the

1 Chippewa Tri-Council, Chief Paul Sandy, Chief Lorraine McRae, and Chief William McCue, Barrie, Ontario, to J.R. Goudie, Specific Claims Branch, Government of Canada, Department of Indian Affairs, Ottawa, June 10, 1986, (ICC Documents, pp. 190-95) (hereinafter Chippewa Tri-Council Claim Submission).

2 Chippewa Tri-Council Claim Submission (ICC Documents, p. 190).

Narrows at Lake Simcoe to Matchidash Bay (marked as the "Carrying Place") and the Severn River route to the north of the footpath.[3]

The Tri-Council stated that "[t]he treaty seems to have involved a right of passage for the British through Chippewa territory . . . and not the surrender of any land."[4] The Tri-Council asserted that the legal basis for the claim was that "the Department of Indian Affairs on behalf of the Crown in right of Canada embarked upon the Crawford Purchase enterprise without exercising or exerting any of its fiduciary trust responsibilities to the Chippewa Tri-Council Nations."[5] Furthermore, the Chippewa Tri-Council asserted that Canada breached its fiduciary responsibilities by including the Collins Treaty lands in the 1923 Williams Treaty. As a result of these alleged breaches, the Chippewa Tri-Council Nations submitted that their people "suffered damages arising out of equitable fraud and misrepresentation in the nature of loss of land, hunting, fishing, and trapping rights, as well as a total failure to be compensated for their interest in the Collins Treaty lands."[6] Although the Chippewa Tri-Council was aware that it could have asserted a claim to "an unsurrendered Indian title to the Collins Treaty lands," it elected to proceed under the Specific Claims Policy on the grounds that there was a breach of lawful obligation on the part of the Crown.[7]

On June 18, 1993, Ms Christine Cram, Director, Specific Claims East/Central Directorate, wrote to the Chiefs of Beausoleil, Rama, and Georgina Island, to advise them of Canada's preliminary position that no outstanding "lawful obligation" arose in relation to the "Collins Treaty" claim.[8] After setting out a brief chronology of the historical events involved in the claim, Ms Cram's letter states:

> It is unclear from the evidence as to whether the parties intended on concluding an arrangement to provide a right of passage or for the purchase of lands. We are also unable, due to a lack of information, to ascertain who was party to the arrangement or who should have been party to the arrangement.

3 This map is annotated as follows: "N.B. The distance as laid down in this sketch between the two Lakes is not conformable to the maps, but is exact with the information I received from Mr. Carot, who resided several years at Toronto. Lake La Clie is said to admit of the navigation of small Vessels - N.B. Water sufficient in the river running from it to lake Huron, but interrupted by 6 or 7 shifts." In a different hand is written: "Communication between Lake Ontario and Lake Huron via Lake La Clie c. from Hamilton cor. 1785."

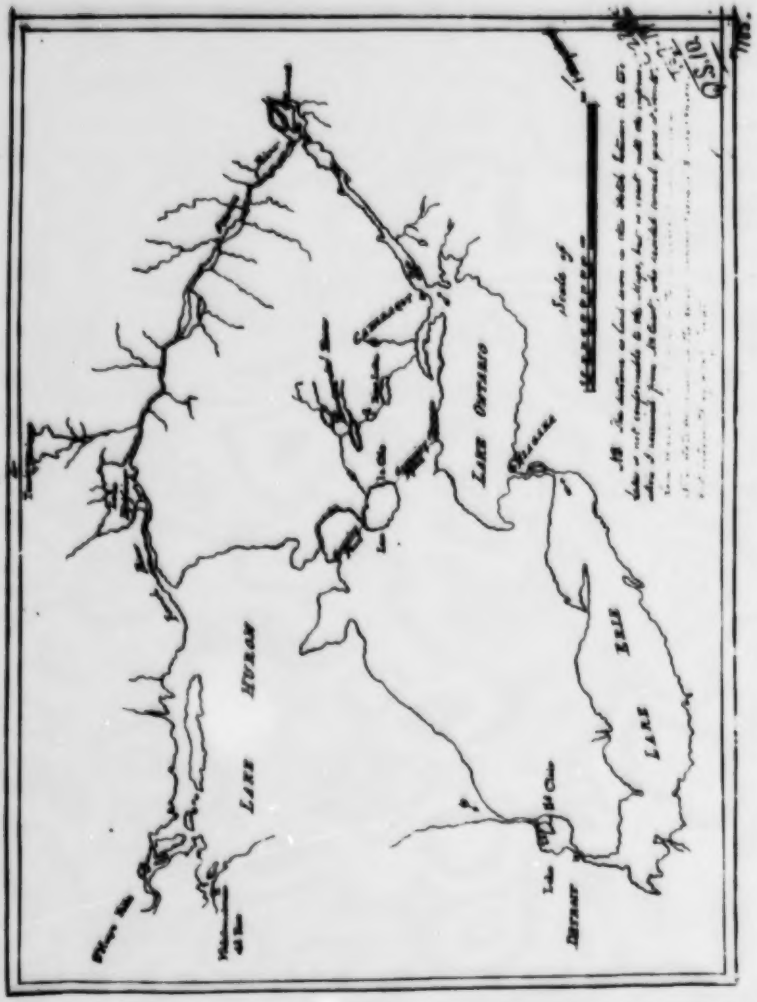
4 Chippewa Tri-Council Claim Submission (ICC Documents, p. 191).

5 Chippewa Tri-Council Claim Submission (ICC Documents, pp. 192-93).

6 Chippewa Tri-Council Claim Submission (ICC Documents, p. 194).

7 Chippewa Tri-Council Claim Submission (ICC Documents, p. 194).

8 Christine Cram, Director, Specific Claims East/Central, Department of Indian Affairs, Ottawa, to Chippewa Tri-Council, Chief William McCue, Chief Jeff Monague, Chief Norm Stinson, June 18, 1993, DIAND file 18260-394, vol. 1 (ICC Documents, pp. 273-77).


LAKE HURON
LAKE ONTARIO
LAKE ERIE

> Based on a review of the claimant's submissions and a review of the historical documentation, it is the preliminary government position that the evidence does not support the view that a treaty or an enforceable agreement was entered into between the Crown and the Indians. Therefore, the claim does not fall within the scope of the Specific Claims Policy. It is also our position that the lands were validly surrendered by the Williams Treaty of 1923.[9]

It should be borne in mind throughout this report that Canada has consistently maintained that it is not entirely clear whether the transaction that took place in 1785 between John Collins and the Chippewa Indians constituted a treaty in the legal sense of the word. Therefore, Canada usually referred to the 1785 transaction in the correspondence as the "Collins Treaty."

On October 8, 1993, Ms Cram sent a second series of letters to the Chippewa Tri-Council Chiefs to confirm Canada's position "that this claim does not give rise to an outstanding lawful obligation on the part of Canada and therefore must be rejected under the Specific Claims Policy." The letter then went on to state that the First Nations had the "option of appealing this decision to the Indian Claims Commission or pursuing litigation."[10]

On August 23, 1993, Vice-Chief Cynthia Wesley-Esquimaux of the Chippewa Tri-Council requested that the Indian Claims Commission (the Commission) review Canada's rejection of the Collins Treaty claim.[11] After receiving Band Council Resolutions from the First Nations authorizing the Commission to conduct an inquiry into the rejection of the claim, the Commission sent letters of notice to Canada and the First Nations on February 2, 1994, confirming that it would conduct an inquiry into the claim.[12]

## MANDATE OF THE INDIAN CLAIMS COMMISSION

In 1991, the Commission was established as an interim body to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into

9 Christine Cram, Director, Specific Claims East/Central, Department of Indian Affairs, Ottawa, to Chippewa Tri-Council, Chief William McCue, Chief Jeff Monague, Chief Norm Stinson, June 18, 1993, DIAND file B8260-394, vol. 1 (ICC Documents, pp. 273-77).

10 Christine Cram, Director, Specific Claims East/Central, Department of Indian Affairs, Ottawa, to Chippewa Tri-Council, Chief William McCue, Chief Jeff Monague, Chief Norm Stinson, October 8, 1993, DIAND file B88260-390, B8260-394, vol. 1 (ICC Documents, pp. 278-80).

11 Cynthia C. Wesley-Esquimaux, Vice-Chief, for the Chippewa Tri-Council, to Angelina Pratt, Head of Research, Indian Claims Commission (ICC), January 28, 1994 (ICC file 2105-18-1).

12 Chief Commissioner Harry S. LaForme, Indian Claims Commission, to Chief and Council of Chippewa Tri-Council, February 2, 1994 (ICC file 2105-18-1).

specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . ."[13] This Policy, outlined in the 1982 federal publication entitled *Outstanding Business: A Native Claims Policy - Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government. The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims which fall under the heading "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[14]

Although the Commission does not have the power to make binding decisions on the validity of claims rejected by the government, it has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an

13 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xv.

14 DIAND, *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian and Northern Affairs that the claim be accepted for negotiation.

## THE COMMISSION'S PLANNING CONFERENCES

In view of the Commissioners' broad authority to "adopt such methods . . . as they may consider expedient for the conduct of the inquiry," they have placed great emphasis on the need for flexibility and informality and have encouraged the parties to be involved as much as is practicable in the planning and conduct of the inquiry. It is to this end that the Commission developed the planning conference as a forum in which representatives of the First Nation and Canada meet to discuss and resolve issues in a cooperative manner.

The planning conference is usually chaired by Commission Counsel or the Commission's Legal and Mediation Advisor to plan the inquiry process jointly. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference to facilitate an informed discussion of the issues. The main objectives of the planning conference are to identify and explore the relevant historical and legal issues, to identify which historical documents the parties intend to rely on, to determine whether the parties intend to call elders, community members, or experts as witnesses, and to set time frames for the remaining stages of the inquiry in the event that the parties are unable to resolve the matters in dispute. The first planning conference also affords the parties an opportunity to discuss whether there are any preliminary issues regarding the scope of the issues or the mandate of the Commission that require resolution before proceeding with the inquiry.

Depending on the nature and complexity of the issues, there may be more than one planning conference. The Commission's experience to date is that these meetings can prove very fruitful. Failures of communication – frequently the cause of misunderstandings – can be rectified. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly evolving law. Even if the planning conferences do not lead to a resolution of the claim and a formal inquiry process is necessary, the conferences assist in clarifying issues and help make the inquiry more effective.

The flexibility inherent in the Commission's planning conferences has been a key to our success because of the opportunities it affords the parties to resolve issues through open dialogue. In this inquiry, there were several planning conferences and telephone conferences with the parties and the Commission between 1994 and late 1997. The inquiry was postponed for a short period in 1995 while the parties conducted further research, and discussions resumed among the parties and the Commission in 1996.[15] Following intensive discussions between the parties on the nature and scope of the claim spanning several months, the parties were able to reach an agreement in principle in 1997 to settle the claim.

This brief report on the Collins Treaty claim of the Chippewa Tri-Council provides an excellent illustration of what can be achieved by Canada and First Nations in a process facilitated by a neutral third party. Part III of this report sets out in more detail how the constructive dialogue between the parties and the Commission's assistance led to the parties' agreement in principle to settle the claim under the Specific Claims Policy.

In view of the parties' agreement in principle, we wish to emphasize that no further steps have been taken by the Commission to inquire into the Chippewa Tri-Council's claim. Since the Commission did not complete its inquiry into the historical and legal basis of the claim, we do not purport to make any findings of fact or law whatsoever in this report. Rather, this report contains a brief summary of the claim and is intended only to advise the public about the nature of the issues involved and how the parties came to resolve them.

15 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Alan Pratt, Legal Counsel for Chippewa Tri-Council, August 22, 1996 (ICC file 2105-18-1).

# PART II

## HISTORICAL BACKGROUND

The parties have agreed, at least for the purposes of this inquiry, to rely on an historical report titled "Collins Treaty Lands, Draft Analytical Report," prepared by Joan Holmes and Associates for the Specific Claims Branch in August 1991 (revised in September 1992).[16] The following background summary of the Collins Treaty specific claim is based on that report and the Chippewa Tri-Council's original statement of claim submitted to the Specific Claims Branch in 1986. This summary is intended only to provide general background information on the nature of the claim and does not represent any findings of fact on the part of the Commission.

It is also important to bear in mind that the issues in the claim were narrowed significantly by agreement of legal counsel for the Chippewa Tri-Council and Canada. In particular, it was agreed by counsel that the facts and circumstances related to the 1923 Williams Treaty were not material to the issues agreed to by the parties. To the extent that we mention events relating to the 1923 Williams Treaty in this brief report, we do so for the sole purpose of providing background information on how the issues in the original claim submission of the Chippewa Tri-Council were narrowed, and ultimately resolved, by agreement of the parties. Eventually, the claim accepted for negotiation by Canada focused only on the promises made in the Collins Treaty and on whether those promises had been fulfilled.

## EARLY HISTORY OF THE LAKE SIMCOE AND LAKE HURON AREA

The Collins Treaty claim relates to an area of land between Lake Simcoe and Georgian Bay in Lake Huron that was long considered to be a strategic geographical location. Lake Simcoe was the hub of a water communication net-

16 ICC, Planning Conference Summary, March 13, 1995; Ron Maurice, note to file, May 23, 1995; François Daigle, Counsel, DIAND Legal Services, to Ron Maurice, Associate Legal Counsel, ICC, June 9, 1995. Joan Holmes and Associates, "Collins Treaty Lands, Draft Analytical Report," prepared for Specific Claims Branch, DIAND, August 1991, revised September 1992 (ICC Documents, pp. 227-55) (hereinafter Holmes report).

work connecting to Kingston via the Trent River system, to Toronto via the Holland-Humber River system, to Lake Huron and the Upper Lakes via Lake Couchiching and the Severn system, and from Lake Huron to Quebec via the French–Ottawa River system. This network has provided every group that controlled the region with trade and communication advantages over its neighbours.[17] Map 3 on page 45 shows the Trent River Navigation system at 1867.

The original inhabitants of the area were the Hurons, but in the 1630s the Five Nations of the Iroquois Confederacy (Mohawk, Oneida, Onondaga, Cayuga, and Seneca) began to push northward into this region in search of more lucrative hunting territories. For two decades, the Five Nations plundered and destroyed Huron villages, and by 1650 the Huron had abandoned the territory. The Iroquois in turn were expelled by the Ojibwa in the early 1700s.[18]

It should be noted that "Ojibwa," "Chippewa," "Saulteaux," and "Mississauga" all refer to peoples speaking similar and in some cases the same dialects of the Algonquian language. Although the names were often used interchangeably, as a general rule early settlers used the term "Chippewa" for the people residing around Lake Simcoe, the Bruce Peninsula, Matchedash Bay, and much of the Thames Valley, whereas they generally applied the term "Mississauga" to those living along the north shore of Lake Ontario and in the Trent River Valley.[19] The fact that these tribal names were often used interchangeably may explain in part the confusion in the historical record about whether John Collins dealt with Mississauga or Chippewa Indians in 1785.

Later, these lands would factor prominently in the plans of the British because of their strategic military importance as a communication route between Lake Ontario and Lake Huron.

## THE ROYAL PROCLAMATION OF 1763

The *Royal Proclamation of 1763* entrenched and formalized a process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians:

17 Cynthia C. Wesley, "The Chippewas of Lake Simcoe, Couchiching and Huron to 1830," report prepared for the Chippewa Tri-Council, Barrie, Ont., 1986 (ICC Documents, pp. 290-503).

18 Edward Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Oxford, 1994), 55, 94-96.

19 Edward Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Oxford, 1994) , xxi, 94-96.

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .[20]

All land surrender treaties entered into with the Indians after 1763 were therefore required to meet these procedural safeguards to prevent frauds from being committed against Indians in the sale and disposition of their traditional territories.

## THE COLLINS TREATY

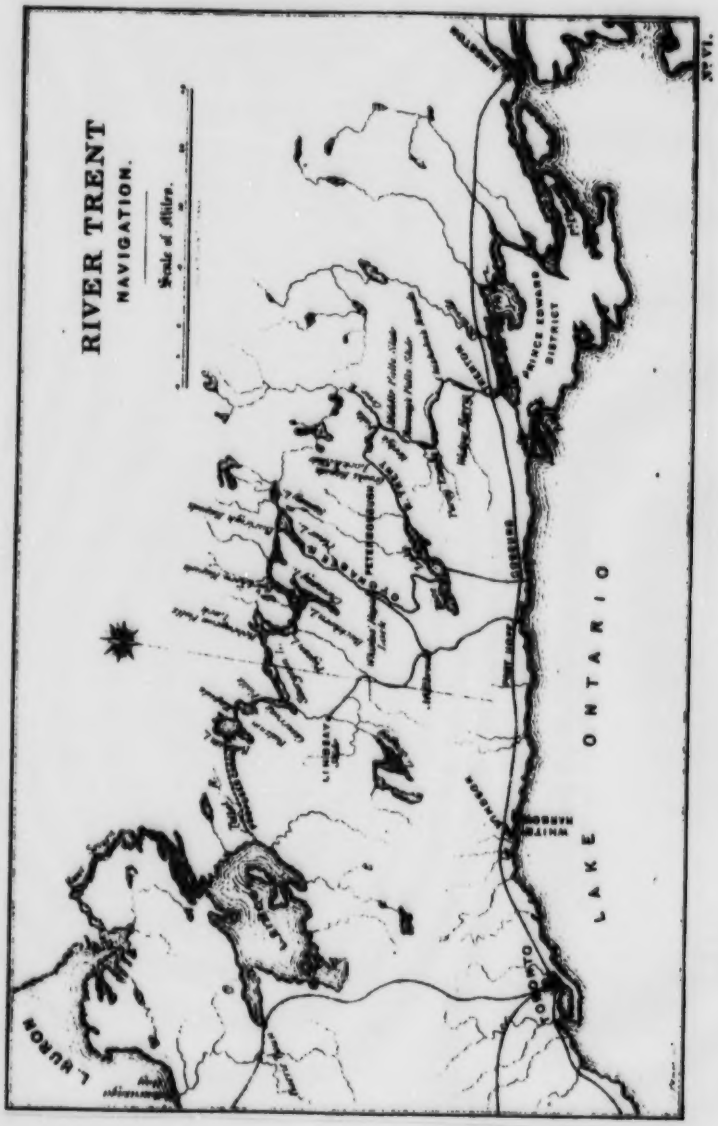
In early 1785, Benjamin Frobisher, a Montreal-based fur trader, reported to Lieutenant Governor Henry Hamilton on the possibility of establishing a trade route from Lake Ontario to Lake Huron. Frobisher also emphasized the strategic military importance of the region to the British colony in these terms:

> [W]e must also consider the advantages that would arise from so ready a Communication with Lake Huron, which while it extends, and adds strength and Security to our Frontier, (If I may be allowed the expression) with the other Settlements afford effectual Protection to the Natives between the Two Lakes, who are Mississagues and some Tribes of Chippawas, from whom I conceive there will be no difficulty in making the purchase, more especially as I believe their best hunting Lands are at some distance from the Tract that would be chosen for the purpose of establishing an entercourse of Transport between the two Lakes.[21]

British authorities were very anxious about the security of their western posts and their lines of supply. On May 22, 1785, Hamilton despatched John Collins, the Deputy Surveyor General, to survey the line of communication between the Bay of Quinte and Lake Huron by Lake Simcoe and report on

20 *Royal Proclamation of 1763*, reprinted in RSC 1970, App. II.

21 Benjamin Frobisher to Henry Hamilton, May 2, 1785, in E.G. Guillet, ed., *The Valley of the Trent*, Champlain Society, Ontario Series, 1 (Toronto: University of Toronto Press, 1967), 132-36 (ICC Documents, pp. 23-27).


RIVER TRENT
NAVIGATION.
LAKE ONTARIO
PRINCE EDWARD DISTRICT
TORONTO
L. HURON

what lands it might be necessary to purchase from the Indians in the region.[22] The instructions to Collins state, in part:

> You will particularly note the depth of water at every necessary place and mark the soundings on your plan or chart. The parts navigable for the different sorts of crafts – the nature of the soil, and its produce, particularly timber. The Indian tribes, on the communication, their numbers, disposition . . .[23]

Six days later, Hamilton sent additional instructions to Collins, concerning the military importance of the route:

> You will take especial notice in your report of the stations which may be most advantageous for the erecting of forts, redoubts, or batteries – having in view, first the protection of the shipping, or small craft, secondly the advantages of giving shelter and security in case of an attack from a regular force, or in the event of an Indian War. The nature of the soil, the distance of commanding grounds, the means of procuring water, and of keeping communication by land and water are to be considered.[24]

On July 27, 1785, Collins started up the Trent River on his way to Lake Huron. In a memo dated August 9, 1785, he described an agreement with Chiefs of the Mississaga Nation in the following manner:

> At a conference held by John Collins and William R. Crawford Esqr. with the principal Chiefs of the Missisaga Nation Mr. John Rousseau Interpreter – it was unanimously agreed that the King shall have a right to make roads through the Missisaga Country, That the Navigation of the Rivers and Lakes, shall be open and free for his Vessels and those of his Subjects, that the Kings Subjects shall carry on a free trade unmolested, in and through the Country, That the King shall erect Forts, Ridouts, Batteries, and Storehouses, &ca. in all such places as shall be judged proper for that purpose – respecting Payment for the above right, the Chiefs observed they were poor and Naked, they wanted Cloathing and left it to their good Father to be a judge of the quantity . . .[25]

It is this transaction that is referred to as the "Collins Purchase" or the "Collins Treaty." On its face, Collins's memorandum describes the transaction strictly in terms of a right of passage (or right of way) agreement. That is, the

22 R.J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, February 1984) (ICC Documents, p. 175).
23 Henry Hamilton to John Collins, May 22, 1785, Archives of Ontario, *Report*, 1905 (ICC Documents, pp. 28-29).
24 Henry Hamilton to John Collins, May 28, 1785, in Holmes report, p. 13 (ICC Documents, p. 242).
25 Deputy Surveyor John Collins's Memorandum on Indian Purchase, August 9, 1785, quoted in Holmes report, pp. 13-14 (ICC Documents, pp. 244-45).

Crown was to be allowed to make roads and travel freely along rivers in exchange for an unspecified quantity of clothing. Later descriptions of what transpired between Collins and the Indians, however, suggest that it was a land surrender treaty.

Seven years later, Surrender No. 3, dated December 7, 1792, purported to confirm a previous surrender of land made on May 22, 1784, between Lake Ontario and Lake Erie (also known as the "Between the Lakes Purchase"). The following excerpt from the surrender, which was taken from certain Mississauga Chiefs of southern Ontario, also refers to the Collins Treaty and describes the land involved as a communication route and right of passage:

> And whereas at a conference held by John Collins and William R. Crawford, Esqrs., with the principal Chiefs of the Messissague Nation, Mr. John Rousseau, Interpreter, it was unanimously agreed that the King should have a right to make roads thro' the Messisague Country, that the navigation of the said rivers and lakes should be open and free for His vessels and those of His subjects, that the King's subjects should carry on a free trade unmolested in and thro' the country: Now this Indenture doth hereby ratify and confirm the said conference and agreement so had between the parties aforesaid, giving and granting to His said Majesty a power, and right to make roads thro' the said Messissage Country together with the navigation of the said rivers and lakes for His vessels and those of His subjects trading thereon free and unmolested . . . [26]

Correspondence entered into over a year later by William Chewett, Deputy Surveyor for Upper Canada, suggests that the Chippewas were not aware of any previous agreement or treaty with respect to their lands. On August 31, 1794, Chewett reported on Deputy Surveyor Jones's survey of the area around Lake Simcoe in the following terms:

> Mr. Jones not being in a condition to write from his being unwell with fever and ague, has requested to me to make the following report to you. . . .
>
> Lake Simcoe. – That during his survey in the winter, about the month of March, being at the house of an Indian Trader, John Culbertson by name, some Chippewas and Missassagas came and enquired of Wapinose, a Mississago, the business of the Surveyor – Wapinose made answer that he came to open a line for the benefit of trade, and that both parties would find the advantage from it in a short time. The Chippewas and Missassagas then said they had no knowledge of the sale of those lands, and at length began a dispute with Wapinose for accompanying the Surveyor.

26 Surrender No. 3, December 7, 1792, quoted in Holmes report, p. 16 (ICC Documents, p. 245).

Wapinose said he was very sensitive of the same, but that surveying did not take the lands from them . . .[27]

Two weeks after this report was written, D.W. Smith, Acting Surveyor General, instructed Surveyor Alexander Aitkin to survey a communication between Lake Simcoe and Matchedash Bay. Smith wrote:

If upon Enquiry and the accumulation of incidents, you may think it prudent, that further presents be made to satisfy the Indians, should they appear Jealous or discontented, you will report to me . . . you will estimate the particulars, of what they may expect; as a most complete ratification of the Cessions of the Indians must be then obtained –

You are principally to survey the communication pointed out by Mr. Cowan as more easy of access than the old Route. This Tract, if found expedient, must be exchanged in Lieu of that which has formerly been supposed to have been purchased; The object is to establish at the End of Lake Simcoe a Settlement, and another at Matchedosh Bay . . .[28]

Three months later, Lord Dorchester, Governor in Chief, issued instructions concerning the purchase of lands from the Indians. Part of these instructions read as follows:

Article 1. It having been thought advisable for the King's Interest that the System of Indian Affairs should be managed by Superintendants under the direction of the Commander in Chief of His Majesty's Forces in North America. No Lands are therefore to be purchased of the Indians, but by the Superintendant General and Inspector General of Indian Affairs, or in his absence by the Deputy Superintendant General, or a Person specially Commissioned for that Purpose by the Commander in Chief.[29]

In 1795, Jean-Baptiste Rousseau, the interpreter who accompanied Collins in 1785, signed a statement confirming his view that there had been a purchase of land from the Chippewas at that time. Rousseau gave the following description of the lands involved:

27 William Chewett to E.B. Littlehales, August 31, 1794, in E.A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada*, 5 vols. (Toronto: Ontario Historical Society, 1923-31), III ( ICC Documents, p. 57).

28 D.W. Smith to Alexander Aitken, September 12, 1794, in F.B. Murray, ed., *Muskoka and Haliburton, 1615-1875: A Collection of Documents*, Champlain Society, Ontario Series, 6 (Toronto: University of Toronto Press, 1963), 98 (ICC Documents, pp. 58-61).

29 Lord Dorchester to John Johnson, December 24, 1794, National Archives of Canada (hereinafter NA), RG 10, vol. 789, pp. 6768-70 (ICC Documents, pp. 66-67).

> I certify that the purchase made from the Chippewa Indians between Lake La Clie, now Lake Simcoe & Matchidash Bay, as nearly as I can recollect, was as follows –viz – One mile on each side of the foot path from the Narrows at Lake Simcoe to Matchidash Bay, with three Miles and a half Square, at each end of said Road or foot path, for the building of Stores or any other public purpose, also one mile on each Side of the River which empties out of Lake Simcoe into Matchidash Bay for the purpose of carrying on the Transport.[30]

In 1830, the Chippewas were settled by Sir John Colborne, Lieutenant Governor of Upper Canada, on a tract of land between Coldwater and Lake Couchiching, referred to as the "Coldwater Tract," which was subsequently surrendered in November 1836. The Chippewas later divided into three distinct bands and settled onto separate reserves – Chief Aisance and his Band settled on Beausoleil Island in 1842, Chief Yellowhead and his Band went to Rama in 1838, and Chief Joseph Snake and his Band moved to Snake Island (now Georgina Island) in about 1838. When the soil on Beausoleil Island proved to be unsuitable for cultivation, the Band moved to the Christian Islands, which were set aside as reserve lands in the 1850s.

## THE WILLIAMS TREATY

In April 1923, a joint commission, chaired by A.S. Williams, was appointed by the Government of Canada and the Province of Ontario to inquire into claims submitted by the Chippewa Indians of Lakes Huron and Simcoe, and the Mississauga Indians of Rice Lake, Mud Lake, and Lake Scugog.[31] The Commissioners concluded the Williams Treaty on October 31, 1923, with the "Chippewa Indians of Christian Island, Georgina Island and Rama" which provided for the surrender of three large parcels of land in southern and central Ontario:

> Known collectively as the Williams Treaties the agreements which provided for these acquisitions concerned the following areas of land: a) a section enclosed by the northern shore of Lake Ontario, about one township in depth between the Trent River and the Etobicoke River; b) a parcel of land lying between the northern extremity of the above-described area and Lake Simcoe, and bounded approximately by the Holland River and the boundary between the counties of Victoria and Ontario; c) a very large tract, lying between Lake Huron and the Ottawa River bounded on the north by

30 Statement by J.B. Rousseau, Interpreter and Trader, May 21, 1795, in Holmes report, p. 21 (ICC Documents, pp. 69, 250).

31 Robert J. Surtees, *Treaty Research Report: The Williams Treaties* (Ottawa: DIAND, 1986).

the Mattawa River-Lake Nipissing and French River line and on the south by earlier treaties concluded in 1818 and 1819.[32]

32 Robert J. Surtees, *Treaty Research Report: The Williams Treaties* (Ottawa: DIAND, 1986).

# PART III

## ISSUES

After considerable discussion between the parties and the exchange of correspondence, the issues in the inquiry were narrowed significantly. The last statement of issues drafted by legal counsel for the Chippewa Tri-Council was framed as follows:

1. Did representatives of the Chippewa Tri-Council Nations and the Crown enter into a treaty in 1785?
   a) Was a treaty entered into?
   b) Was the treaty made by the Chippewa Tri-Council Nations who were the ancestors of the present-day Chippewa Tri-Council?
2. If a treaty was entered into, was it ratified and confirmed by Treaty No. 3 on December 7, 1792?
3. If a treaty was entered into, what were the rights and obligations of the parties under the terms of the treaty?
   a) Did the treaty provide for rights of passage and a trade route through the Chippewa traditional lands affected by the treaty?
   b) Did the treaty provide for the payment of compensation by the Crown to the Chippewa Tri-Council Nations?
4. If a treaty was entered into, were the terms of the treaty fulfilled?
5. Does the Crown in right of Canada have an outstanding lawful obligation under Canada's Specific Claims Policy?
6. The parties have agreed that issues related to land or other interests addressed in the 1923 Williams Treaty will not be considered in this inquiry.[33]

33 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to Laurie Klee, Counsel, Department of Justice, February 19, 1977 (ICC file 2105-18-01).

During the balance of 1997, the parties made progress in their review and discussion of these significantly narrowed issues with the assistance of the Commission.

# PART IV

## THE INQUIRY

### THE PLANNING CONFERENCES, APRIL 1994 – OCTOBER 1997

The first planning conference was held on April 5, 1994, in Toronto with representatives of the Chippewa Tri-Council, Canada, and the Commission in attendance. At that conference, several issues were discussed and clarified. In particular, Canada's legal counsel, Mr François Daigle, raised questions about whether a recent decision of the Supreme Court of Canada on the 1923 Williams Treaty and Canada's decision to enter into negotiations[34] with the signatories to that treaty might affect the damages being claimed in relation to this claim. After a thorough discussion of the proposed issues, the Commission agreed to provide the parties with a draft statement of issues for discussion purposes. An overview of the Commission's mediation mandate was also presented to the parties, at which time it was agreed by both parties that the Commission's mediation function might be invoked in the future if the parties were unable to resolve any of the issues in question.

Usually the next step in the inquiry process is to hold a community session to provide an opportunity for elders and other members of the First Nation to share information relevant to the claim with Commissioners. In this inquiry, there was some question about whether a community session would be necessary because this was a pre-Confederation claim.

A second planning conference was held on September 15, 1994, in Toronto to finalize and to clarify issues, to discuss how the inquiry would be conducted, and to review other planning matters. The First Nations clarified their position by asserting that there *was* a treaty with the First Nations, but

34 The 1923 Williams Treaty claim was formally accepted for negotiation by letters dated April 18, 1994, from John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Jeffrey Monague, Chippewas of Beausoleil First Nation, Chief William McCue, Chippewas of Georgina Island First Nation, and Chief Norman Stinson, Chippewas of Rama First Nation. The letters state, in part, that "there may be an outstanding lawful obligation . . . in that promises of fair and adequate compensation and reserve lands were not fulfilled by Canada and Ontario."

the Collins Treaty was not, and could not, amount to a treaty of cession, surrender, or purchase because of the formalities required for a land cession treaty. The Chippewa Tri-Council's legal counsel, Alan Pratt, outlined its position in a letter dated September 28, 1994:

> Pursuant to the definition of treaty described in cases such as *Sioui* and *Cote*, there is sufficient evidence of a valid treaty in 1785 whereby the Chippewas agreed to grant a right of way to the British in exchange for some reasonable amount of clothing. In particular, the detailed reference to the terms of the [Collins] Treaty in the later Treaty 3 of 1792 is very comparable to the evidence accepted by the Quebec Court of Appeal in *Cote*. The clothing was of great importance to the Chippewas, since according to Collins they were *poor and Naked*. In addition, the rights acquired by the British Crown were of great importance since they secured an important route to Lake Huron. The surrounding circumstances, subject matter of the treaty and the subsequent conduct of the parties meet the legal tests of a treaty.[35]

The Chippewa Tri-Council further submitted that there was a breach of the Crown's lawful obligations under the treaty. The First Nations submitted that the terms of the Collins Treaty affirmed Chippewa title to the tract in question – the area that allowed for a right of passage through Mississauga country from Lake Simcoe to Georgian Bay. Counsel also stated that the Collins Treaty was not a treaty of cession and granted only the power to make roads, even though the Crown erroneously treated the Collins Treaty as a land cession. The lands were sold off to third parties, without any surrender of Indian (aboriginal) title or compensation paid. Therefore, the Chippewa Tri-Council put forward the following arguments in support of its assertion that the Crown had breached its lawful obligations:

- The Treaty was breached by the denial of the Chippewa interest that was implicitly confirmed by the treaty and by the Crown's unilateral expansion of its rights of passage into *de facto* complete dominion over the tract.
- Thus, the sales of the lands affected by the treaty were in breach of the treaty itself.
- Further, the consideration promised under the Treaty for certain limited rights was not provided. Even though its value may be minimized today, the clothing promised was obviously of considerable value to the Chippewas who were clearly in distress at the time.

35 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to François Daigle, Counsel, Specific Claims Ottawa, September 28, 1994 (ICC file 2105-18-1).

> • In addition, the right of passage was of crucial significance to the British as all the surrounding documents make clear, and the Crown must have intended to pay reasonable value for those rights.[36]

As regards Canada's concerns about the potential impact of compensation negotiations into the 1923 Williams Treaty on the scope of this claim, Mr Pratt suggested that if Canada accepted that the Williams Treaty claim included losses in relation to the alleged unlawful alienation of land, the Chippewa Tri-Council was prepared to discuss further the relationship between the two claims.

In an effort to resolve the outstanding questions around what impact, if any, the 1923 Williams Treaty negotiations would have on the Collins Treaty claim, Canada set out its position in a letter from François Daigle dated November 3, 1994:

> [T]he issue of compensation for loss of use of the "Collins Treaty" lands, which are included in the Williams Treaty lands, has been dealt with in the Williams Treaty claim negotiations . . .[37]

Over the next five months, the parties exchanged draft statements of issues in an effort to come to some agreement on the scope of the Commission's inquiry. It was to this end that a third planning conference was held on March 13, 1995. The possibility of conducting a community session was again considered, but it became necessary to delay the inquiry for several months because new historical information had emerged since the claim had been submitted in 1986. Additional time was therefore required to allow the parties to compile the new documents and to assess them in light of the substantial historical record.

In February 1996, counsel for the Chippewa Tri-Council informed the Commission that the inquiry into the Collins Treaty claim would have to be postponed until further notice, owing to its ongoing negotiations with Canada in relation to the 1923 Williams Treaty. There was concern that the negotiations under the Williams Treaty could have a direct impact upon the Collins Treaty claim.[38] In July 1996, the inquiry into the claim was placed in abey-

36 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to François Daigle, Counsel, Specific Claims Ottawa, September 28, 1994 (ICC file 2105-18-1).

37 François Daigle, Counsel, Specific Claims Ottawa, to Alan Pratt, Legal Counsel to the Chippewa Tri-Council, November 3, 1994 (ICC file 2105-18-1).

38 Ron S. Maurice, Commission Counsel, ICC, to Chippewa Tri-Council, Chiefs Jeff Monague, Lorraine McRae, William McCue, February 1, 1996 (ICC file 2105-18-1).

ance pending further notice from the First Nations that they wished to proceed. In August 1996, the Chippewa Tri-Council decided to proceed with the inquiry into the Collins Treaty Claim.[39]

A fourth planning conference was scheduled on November 4, 1996, in Ottawa again to discuss and to agree on the issues raised in the claim and to define accurately the scope of the inquiry. In preparation for that meeting, Alan Pratt clarified the Tri-Council's position in a letter dated October 11, 1996:

> The Tri-Council's position is that there was a valid treaty or agreement whereby the Chippewas agreed to a right of way or right of passage through Chippewa territory in exchange for suits of clothing in a reasonable amount and quality, commensurate with the nature and value of the rights conferred by them. The Inquiry will not be asked to consider whether the treaty or agreement affected Chippewa title beyond that limited grant of rights. Accordingly, the statement of issues can be significantly narrowed.[40]

By the end of January 1997, the parties were in substantial agreement as to the scope of the issues. They also agreed that they would not deal with issues arising from the 1923 Williams Treaty because they were to be addressed in a separate negotiation process.

In April 1997, Canada's legal counsel, Ms Laurie Klee, advised that she was conducting another legal review of the claim based on the new information and the agreed issues to determine whether the claim should be accepted for negotiation. The legal review was completed before the end of the month and was forwarded to the Specific Claims Branch for its consideration. In September 1997, Canada made an informal offer to accept the claim as a "fast-track claim" under the Specific Claims Policy, a process intended to settle claims for compensation of $500,000 or less. Discussions between the parties ensued as to the manner in which the claim would be accepted and whether the Chippewa Tri-Council First Nations would be prepared to negotiate on this basis.

In the interests of resolving all outstanding issues, a fifth and final planning conference was held on October 8, 1997, with the assistance of the Commission's Legal and Mediation Advisor, the Hon. Robert F. Reid, and Commission Counsel, Ron Maurice. The purpose of the meeting was to dis-

39 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to Ron S. Maurice, Commission Counsel, ICC, August 14, 1996 (ICC file 2105-18-1).

40 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to Ron S. Maurice, Commission Counsel, ICC, and François Daigle, Counsel, Specific Claims Ottawa, October 11, 1996 (ICC file 2105-18-1).

cuss the prospect of a negotiated settlement and to discuss the compensation to be offered in the event that Canada and the Chippewa Tri-Council officially agreed to have the claim negotiated on a fast-track basis. With the cooperation of both parties, their counsel, and the Commission, an agreement in principle was reached on the terms of a proposed settlement.

On January 28, 1998, Mr Michel Roy, Director General, Specific Claims Branch, wrote to the Chiefs of the Chippewa Tri-Council to confirm that Canada had accepted the "Collins Treaty" claim for negotiation:

> I am honoured to accept for negotiation under the Specific Claims Policy the Chippewa Tri-Council . . . specific claim regarding the compensation that was promised, in the terms of the "Collins Treaty", but not paid, for a 1785 right of passage in the area between Lake Simcoe and Lake Huron.
>
> For the purposes of negotiation, Canada accepts that the Crown has an outstanding lawful obligation toward the Chippewas. Although the terms of the "Collins Treaty" remain unclear, it is fairly well established that some kind of agreement was made between Collins and the Chippewas, probably for a right of passage from Lake Simcoe to Lake Huron. Mr. Collins likely made a promise to provide clothing to the Chippewas in exchange for the right of passage. That promise has never been fulfilled.[41]

Thus, the claim that was ultimately accepted for negotiation related to the agreement between the Crown and the Chippewas for a right of passage from Lake Simcoe to Lake Huron in exchange for certain promises that were not fulfilled.

On February 5, 1998, Alan Pratt, counsel to the First Nations, wrote to the Commission to confirm that it could close its file on the inquiry because Canada's offer for negotiation had been made and accepted in principle by the Chippewa Tri-Council. In that letter, Mr Pratt thanked the Commission

> for providing a forum in which this matter could be discussed, re-examined, accepted, and settled in principle. In my view this case is an excellent example of the value of an independent claims body with a flexible mandate. Without the assistance of the Commission this would likely remain just another rejected claim, perhaps on its way to court but certainly not a source of redress and reconciliation.[42]

41 Michel Roy, Director General, Specific Claims Branch, to Chief Paul Sandy, Chippewas of Beausoleil First Nation, Chief William McCue, Chippewas of Georgina Island First Nation, and Chief Lorraine McRae, Chippewas of Mnjakaning (Rama) First Nation, January 28, 1998 (ICC file 2105-18-1).

42 Alan Pratt, Legal Counsel to the Chippewa Tri-Council, to Ralph Keesickquayash, Counsel, ICC, February 5, 1998 (ICC file 2105-18-1).

We wholeheartedly agree Despite the limitations of the Commission's mandate, which allows it only to make non-binding decisions, the processes adopted by the Commission can achieve real progress when First Nations and Canada are committed to settling claims in a non-adversarial setting.

In the end, a claim that had remained unsettled for many years was resolved through perseverance, good will, the use of non-adversarial dispute-resolution techniques, and the shared desire of the parties to resolve a long-standing grievance in a fair and just manner.

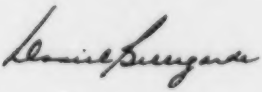
# PART V

## CONCLUSION

After an extensive period of discussions, representatives of the Chippewa Tri-Council First Nations and Canada were able to reach an agreement in principle on October 8, 1997, with the assistance of the Indian Claims Commission. The role of the Commission throughout this inquiry was to bring the parties together in an informal, non-adversarial setting, where the parties could discuss the claim's history and its substantive merits. With the cooperation of the parties and their legal counsel, a full inquiry into the claim was avoided and the considerable costs and resources typically consumed in the course of litigation were averted.

The Commission is pleased that it has been able to assist the parties in coming to an agreement in principle for the settlement of the Collins Treaty claim.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-Chair

Roger Augustine
Commissioner

Dated this 19th day of March, 1998

# APPENDIX A

## CHIPPEWA TRI-COUNCIL INQUIRY

| | | |
|---|---|---|
| 1 | **Notice of decision to conduct inquiry** | February 4, 1994 |
| 2 | **Planning conferences** | |
| | Planning conference 1 | April 5, 1994 |
| | Planning conference 2 | September 15, 1994 |
| | Planning conference 3 | March 13, 1995 |
| | Planning conference 4 | November 4, 1996 |
| | Planning conference 5 | October 8, 1997 |
| 3 | **Canada's offer to accept the claim** | January 28, 1998 |
| 4 | **Chippewa Tri-Council's acceptance in principle** | February 5, 1998 |

5 **Contents of the formal record**

The formal record for the Chippewa Tri-Council Inquiry consists of the following materials:

- documentary records (four volumes of documents and one annotated index)
- correspondence among the parties and the Commission

The report of the Commission and the letter of transmittal to the parties will complete the record for this inquiry.

# APPENDIX B

## GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

JAN 2 8 1998

WITHOUT PREJUDICE

Chief Paul Sandy
Chippewas of Beausoleil First Nation
c/o Cedar Point Post Office
PENETANGUISHENE ON L0K 1P0

Dear Chief Sandy:

On behalf of the Government of Canada, I am honoured to accept for negotiation under the Specific Claims Policy the Chippewa Tri-Council (representing the Chippewas of Beausoleil, Rama and Georgina Island) specific claim regarding compensation that was promised, in the terms of the "Collins Treaty", but not paid, for a 1785 right of passage in the area between Lake Simcoe and Lake Huron.

For the purposes of negotiation, Canada accepts that the Crown has an outstanding lawful obligation toward the Chippewas. Although the terms of the "Collins Treaty" remain unclear, it is fairly well established that some kind of agreement was made between Collins and the Chippewas, probably for a right of passage from Lake Simcoe to Lake Huron. Mr. Collins illegally made a promise to provide clothing to the Chippewas in exchange for the right of passage. That promise has never been fulfilled.

I have been informed by Mr. Normand Leveseeur, the federal negotiator assigned to this specific claim, that he has met with you and your negotiators, Messrs. Alan Pratt and Ian Johnson, on a number of occasions, where the merits of the claim were discussed. At the last meeting Mr. Leveseeur presented to your negotiation team an option to settle the claim. This option would be worth $565,000 and includes not only compensation for this claim but the costs incurred by your communities for ratification and legal advice. Messrs. Pratt and Johnson agreed to present this proposal to the Chippewa Tri-Council and I understand that all three Chiefs and Councils have agreed in principle to a settlement on the above mentioned terms.

.../2

Canada

I congratulate you on reaching this agreement. I understand that both negotiation teams will have to meet in order to discuss an appropriate ratification process and the issue of apportionment among the three Chippewa First Nations.

I would like to wish you luck in the remainder of your negotiations and hope that a favourable vote will be reached before too long. I look forward to hearing about the outcome of your claim.

Yours truly,

Michel Roy
Director General
Specific Claims Branch

Encl.

c.c. Chief William McCue
Chief L. McRae

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

JAN 2 8 1998

WITHOUT PREJUDICE

Chief Lorraine McRae
Chippewas of Mnjikaning First Nation
Box 35
RAMA ON L0K 1T0

Dear Chief McRae:

On behalf of the Government of Canada, I am honoured to accept for negotiation under the Specific Claims Policy the Chippewa Tri-Council (representing the Chippewas of Beausoleil, Rama and Georgina Island) specific claim regarding compensation that was promised, in the terms of the "Collins Treaty", but not paid, for a 1785 right of passage in the area between Lake Simcoe and Lake Huron.

For the purposes of negotiation, Canada accepts that the Crown has an outstanding lawful obligation toward the Chippewas. Although the terms of the "Collins Treaty" remain unclear, it is fairly well established that some kind of agreement was made between Collins and the Chippewas, probably for a right of passage from Lake Simcoe to Lake Huron. Mr. Collins likely made a promise to provide clothing to the Chippewas in exchange for the right of passage. That promise has never been fulfilled.

I have been informed by Mr. Normand Levasseur, the federal negotiator assigned to this specific claim, that he has met with you and your negotiators, Messrs. Alan Pratt and Ian Johnson, on a number of occasions, where the merits of the claim were discussed. At the last meeting Mr. Levasseur presented to your negotiation team an option to settle the claim. This option would be worth $585,000 and includes not only compensation for this claim but the costs incurred by your communities for ratification and legal advice. Messrs. Pratt and Johnson agreed to present this proposal to the Chippewa Tri-Council and I understand that all three Chiefs and Councils have agreed in principle to a settlement on the above mentioned terms.

.../2

Canada

I congratulate you on reaching this agreement. I understand that both negotiation teams will have to meet in order to discuss an appropriate ratification process and the issue of apportionment among the three Chippewa First Nations.

I would like to wish you luck in the remainder of your negotiations and hope that a favourable vote will be reached before too long. I look forward to hearing about the outcome of your claim.

Yours truly,

Michel Roy
Director General
Specific Claims Branch

Encl.

c.c. Chief William McCue
Chief Paul Sandy

Indian and Northern Affairs Canada ... Affaires du Nord Canada

JAN 2 8 1998

WITHOUT PREJUDICE

Chief William McCue
Chippewas of Georgina Island First Nation
R.R. #2
SUTTON WEST ON L0E 1R0

Dear Chief McCue:

On behalf of the Government of Canada, I am honoured to accept for negotiation under the Specific Claims Policy the Chippewa Tri-Council (representing the Chippewas of Beausoleil, Rama and Georgina Island) specific claim regarding compensation that was promised, in the terms of the "Collins Treaty", but not paid, for a 1785 right of passage in the area between Lake Simcoe and Lake Huron.

For the purposes of negotiation, Canada accepts that the Crown has an outstanding lawful obligation toward the Chippewas. Although the terms of the "Collins Treaty" remain unclear, it is fairly well established that some kind of agreement was made between Collins and the Chippewas, probably for a right of passage from Lake Simcoe to Lake Huron. Mr. Collins likely made a promise to provide clothing to the Chippewas in exchange for the right of passage. That promise has never been fulfilled.

I have been informed by Mr. Normand Lavasseur, the federal negotiator assigned to this specific claim, that he has met with you and your negotiators, Messrs. Alan Pratt and Ian Johnson, on a number of occasions, where the merits of the claim were discussed. At the last meeting Mr. Lavasseur presented to your negotiation team an option to settle the claim. This option would be worth $565,000 and includes not only compensation for this claim but the costs incurred by your communities for ratification and legal advice. Messrs. Pratt and Johnson agreed to present this proposal to the Chippewa Tri-Council and I understand that all three Chiefs and Councils have agreed in principle to a settlement on the above mentioned terms.

../2

Canada

I congratulate you on reaching this agreement. I understand that both negotiation teams will have to meet in order to discuss an appropriate ratification process and the issue of apportionment among the three Chippewa First Nations.

I would like to wish you luck in the remainder of your negotiations and hope that a favourable vote will be reached before too long. I look forward to hearing about the outcome of your claim.

Yours truly,

Michel Roy
Director General
Specific Claims Branch

Encl.

c.c. Chief Paul Sandy
Chief L. McRae

# APPENDIX C

## CHIPPEWA TRI-COUNCIL CONFIRMATION OF ACCEPTANCE IN PRINCIPLE

ALAN PRATT

e-mail PrattA@nelcom.ca
www.nelcom.ca/~PrattA/Homepage.htm

February 5, 1998

**By Facsimile and Regular Mail**

Mr. Ralph Keesickquayash, Counsel
Indian Claims Commission
Suite 400 – 427 Laurier Avenue W.
Ottawa, Ontario
K1P 1A2

Dear Mr. Keesickquayash:

**Re: Chippewa Tri-Council - Collins Treaty Claim**

I am pleased to enclose copies of letters dated January 28, 1997 from Michel Roy, Director General, Specific Claims Branch, to each of the three Chippewa Tri-Council Chiefs on this matter. As you can see, the claim has now been accepted for negotiations and an offer has both been made and accepted in principle.

In light of this development, the Commission can now close its file. On behalf of the Chippewa Tri-Council I would like to express my appreciation and thanks to the Commission for providing a forum in which this matter could be discussed, re-examined, accepted and settled in principle. In my view this case is an excellent example of the value of an independent claims body with a flexible mandate. Without the assistance of the Commission, this would likely remain just another rejected claim, perhaps on its way to court but certainly not a source of redress and reconciliation.

Yours very truly,

Alan Pratt
AP:rj
Encl.
cc. Chippewa Tri-Council Chiefs
Normand Levasseur, DIAND
Honourable Robert F. Reid, ICC
Ian Johnson

9990 TURTLEDOVE DRIVE, R.R. #1, DUNROBIN, ONTARIO K0A 1T0 TELEPHONE (613) 832-1201 FAX (613) 832-1978

# INDIAN CLAIMS COMMISSION

## FRIENDS OF THE MICHEL SOCIETY INQUIRY
## 1958 ENFRANCHISEMENT CLAIM

### PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

### COUNSEL

For the Friends of the Michel Society
Jerome Slavik / Karin Buss

For the Government of Canada
Richard Wex

To the Indian Claims Commission
Ron S. Maurice / Diana Belevsky

### MARCH 1998

# CONTENTS

**PART I** ***INTRODUCTION*** 73
Background to the Inquiry 74
Mandate of the Indian Claims Commission 76

**PART II** ***HISTORICAL BACKGROUND*** 78
Enfranchisement 78
Map 1: Approximate Location of the Former Michel IR 132 80
Bill C-31 82
Facts Relevant to This Claim 89

**PART III** ***ISSUES*** 91

**PART IV** ***ANALYSIS*** 92
Principles of statutory Interpretation 92
Sub-Issue 1: Statutory Obligation to Maintain Michel Band List 94
Sub-Issue 2: Statutory Obligation to Place Names on Michel Band List 97
Sub-Issue 3: Membership and Band Reconstitution 101
Sub-Issue 4: Statutory Obligation to Recognize Michel Band 103
Fairness in the Result: The Commission's Supplementary Mandate 104

**PART V** ***FINDINGS AND RECOMMENDATION*** 107
Findings 107
Sub-Issue 1: Statutory Obligation to Maintain Michel Band List 107
Sub-Issue 2: Statutory Obligation to Place Names on Michel Band List 108
Sub-Issue 3: Membership and Band Reconstitution 109
Sub-Issue 4: Statutory Obligation to Recognize Michel Band 109
Fairness in the Result: The Commission's Supplementary Mandate 110
Recommendation 111

***APPENDICES***
A Friends of the Michel Society Inquiry 112
B Relevant Provisions of *Indian Act*, RSC 1985 113

# PART I

## INTRODUCTION

This inquiry concerns the question of whether the Friends of the Michel Society (Society), the claimant, has standing to submit a specific claim to the Department of Indian Affairs and Northern Development (DIAND).[1] The Society represents certain descendants and former members of the Michel Band, which was enfranchised in 1958. Enfranchisement refers to the process by which Indian people individually – or bands as a whole – voluntarily or involuntarily lost their registered Indian status and band membership in return for the full rights of Canadian citizenship, such as the right to vote. The notoriously discriminatory enfranchisement provisions[2] were removed from the *Indian Act* in 1985, through what are known as the Bill C-31 amendments. These amendments reinstated Indian status, and in some cases band membership, to most of those people who were enfranchised.

The Society claims that the enfranchisement of the Michel Band in 1958 was invalid, and that various land surrenders, which took place prior to the band enfranchisement, were improper. These matters, however, are not the subject of this inquiry. The purpose of this inquiry is to determine only the preliminary issue of whether the Society has standing to bring a specific claim. Our task is to answer the particular legal question of whether Canada has an obligation to recognize the former members and descendants of the Michel Band as a band within the meaning of the *Indian Act* and the Specific Claims Policy. The Society argues that the Bill C-31 amendments impose such an obligation on Canada. Canada takes the position that the Michel Band ceased to exist as a result of the 1958 enfranchisement, that the Society is not

1 In its submissions to the Commission, the claimant refers to itself as the Michel Band or Michel First Nation, and the officers of the Society refer to themselves as the Chief and council. As the status of the claimant is what is at issue here, we refer to the claimant as either the Society or "the former members and descendants of the Michel Band."

2 The discriminatory provisions of the former versions of the *Indian Act* include, for example, the provision that, when an Indian woman married a non-Indian man, she lost her registered status. The concept of enfranchisement and the applicable statutory regime are discussed in more detail in Part II of this report.

entitled to be recognized as a band under the *Indian Act*, and that it therefore has no standing to bring a specific claim.

## BACKGROUND TO THE INQUIRY

In 1985, certain former Michel Band members and descendants filed a specific claim with Canada alleging the following: (1) that the enfranchisement of various band members in 1928 and the entire Band in 1958 was invalid; and (2) that Canada breached its statutory and fiduciary duties in relation to various surrenders of reserve land obtained from the Michel Band in the early 1900s. Canada took the view that the Specific Claims Policy limited the submission of claims to recognized bands, and refused to consider the alleged impropriety of the surrenders. Canada did agree, however, to review that aspect of the claim involving the 1928 and 1958 enfranchisements, to determine whether the claimants were entitled to be recognized as a band.[3] Following that review, Canada concluded that the Michel descendants were not entitled to such recognition.[4]

The next step taken by the Society was to request that the Minister of Indian Affairs and Northern Development reconstitute the Michel Band pursuant to his discretionary power, under section 17 of the *Indian Act*, to create new bands. Gilbert Anderson and George Callihoo, representatives of the Society, met with the Minister in November 1994 to discuss the matter. In December 1994, the Minister rejected the request.[5]

In 1995, the Society requested that the Indian Claims Commission (the Commission) inquire into the enfranchisement aspect of its claim to determine whether the former members and descendants of the Michel Band were entitled to be recognized as an Indian band, and thus able under the Specific Claims Policy to assert the surrender claims.[6] If the enfranchisement were

3 R.M. Connelly, Director, Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), to Judith Sayers, Barristers, March 27, 1985 (ICC Documents, pp. 949-51). The Director stated: "[S]ince the central claim is that Indian Affairs officials were responsible for the break up of the band, we are prepared, as a first step, to review this aspect of the claim and obtain an opinion from our Department of Justice advisors as to its views of the legality of the enfranchisement of the Michel Band. Should it be determined following this review that the Michel Band was not lawfully enfranchised and should be reconstituted, we can then consider the issues concerning earlier dispositions of reserve lands which you raise in your submission . . ."

4 Jane-Anne Manson, Claims Analyst, Specific Claims West, to Gilbert Anderson, Michel Claim Committee, Edmonton, 13 January 1992, in DIAND file B8620-209 (ICC Documents, pp. 1053-54).

5 Ronald A. Irwin, Minister of Indian Affairs, to Gilbert Anderson and George Callihoo, December 18, 1994, Michel First Nation, Supplementary Documents (ICC Exhibit 1B, tab 9).

6 Gilbert Anderson, Michel Society, to Kim Fullerton, Indian Claims Commission, March 1, 1995 (ICC file 2108-17-01).

found to be invalid, the Michel Band would still exist and clearly have standing under the Policy.

Later, in March 1996, the Society asserted that, even if the 1958 enfranchisement was valid, the Bill C-31 amendments to the *Indian Act* imposed on Canada a statutory obligation to recognize members of the Society as the Michel Band within the meaning of the *Act*. Prior to that, in January 1996, seven members of the Society had applied to the Registrar (the DIAND officer who is in charge of the Indian Register and Band Lists maintained in the Department) to be put on the Michel Band membership list pursuant to section 11 of the *Indian Act*.[7] Section 11 is one of the Bill C-31 amendments and provides, in part, that if a person is entitled to be registered as an Indian because he or she was enfranchised involuntarily – for example, by reason of marriage to a non-Indian – that person is *also* entitled to have his or her name entered in a band list maintained in the Department for a band. The Registrar rejected the application, on the basis that the Minister had to confirm the existence of the Michel Band before she could add names to a Michel Band List.[8] Further, the Registrar noted that, as the Minister had already declined to recognize the Michel Band, she could not register Michel Society members on a Michel Band List. Counsel for the Society requested that the Registrar reconsider her decision of February 2, 1996.[9] By letter dated March 28, 1996, the Registrar again indicated that she needed the Minister to confirm that the Michel Band is an Indian Band for the purposes of the *Indian Act*.[10] Again, the Minister refused to do so.[11]

Between the time of the original submission of the claim to this Commission in March 1995 and receipt of final written submissions from both parties by July 1997, the issues in this inquiry were narrowed significantly. At the third in a series of Commission planning conferences, held in May 1997, the parties agreed that the Commission would consider only the issue of whether Canada has a statutory obligation under the current *Indian Act* to reconstitute the Michel Band, assuming that the Michel Band ceased to exist in 1958.

7 Gilbert Anderson, to Registrar, Indian Registration & Band Lists, DIAND, Ottawa, January 22, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 6).

8 Terri Harris, Registrar, Indian and Northern Affairs, to Gilbert Anderson, Edmonton, February 2, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 5).

9 Jerome N. Slavik, Counsel for the Michel Society, to Terri Harris, Registrar, DIAND, March 6, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 3).

10 Terri Harris, Registrar, Indian and Northern Affairs, to Jerome N. Slavik, Counsel for the Michel Society , March 28, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 2).

11 Ronald A. Irwin, Minister of Indian Affairs and Northern Development, to Gilbert Anderson, Edmonton, September 10, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 1).

The narrow issue was agreed to because the Society was raising new arguments that were not properly before the Commission because they had not specifically been rejected by Canada. The new arguments would also require additional research and analysis. In order to make the process more efficient, it was agreed that the parties would pursue only the Bill C-31 issue for the purposes of this inquiry. If the Society prevailed on its Bill C-31 argument, it would not be necessary to address other issues, such as whether the Society should be recognized as a band at common law, or whether the Crown breached any fiduciary obligations in respect of the 1958 enfranchisement.[12] However, if the Society did not prevail on the narrow issue, it was agreed that a request could be made for the Commission to conduct a second inquiry into the broader issues that have been placed in abeyance for the time being.[13]

It is important to appreciate that this inquiry is thus limited to the legal effect of the Bill C-31 amendments in respect of the issue of standing. We will not be making any findings or recommendations in relation to the claims based on the surrenders of reserve land or the legality of the 1928 and 1958 enfranchisements.

## MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is to conduct inquiries into specific claims and to report on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . ."[14] The Specific Claims Policy, outlined in the booklet *Outstanding Business*, seems to contemplate claims by a band or group of bands, rather than individuals or other groups.[15] Guidelines 1 and 2 of the Policy state as follows:

> 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.

12 Planning Conference Summary, May 23, 1997 (ICC file 2108-17-01).

13 Richard Wex, Counsel, DIAND Legal Services, to Jerome Slavik, Counsel for the Michel Society, June 2, 1997 (ICC file 2108-17-01).

14 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

15 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, if all are bringing the same claim.[16]

In the light of the above, and given that the Commission's mandate is defined by reference to the Policy, Canada argued that the Commission has no authority to determine whether the Society is an Indian band as the term is used in the Policy. Canada ultimately agreed, however, not to challenge the Commission's mandate or authority in this inquiry.[17]

16 *Outstanding Business*, 30.

17 François Daigle, Counsel, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, ICC, October 15, 1996.

# PART II

## HISTORICAL BACKGROUND

Although the question before the Commission is a narrow legal one, it is necessary to set out the background context before embarking on the legal analysis. In this part of the report we examine the statutory regime governing enfranchisement and how that regime evolved from 1857 up to the enactment of the Bill C-31 amendments in 1985. We then outline briefly the facts regarding the Michel Band's enfranchisement that are relevant to this inquiry.

### ENFRANCHISEMENT

The history of enfranchisement begins in the nineteenth century with the evolution of government "civilization" and assimilation policies regarding Indians. Early efforts to assimilate Indian people into the economic and social structures of mainstream colonial society encouraged Indians to abandon traditional livelihoods based on subsistence hunting, trapping, and fishing in favour of becoming farmers and tradesmen. The first direct legislative expression of enfranchisement as a policy tool to foster assimilation was the 1857 *Gradual Civilization Act*. The significance of that statute is explained as follows in the *Report* of the Royal Commission on Aboriginal Peoples:

> [The *Act*] . . . was one of the most significant events in the evolution of Canadian Indian policy. Its premise was that by eventually removing all legal distinctions between Indians and non-Indians through the process of enfranchisement, it would be possible in time to absorb Indian people fully into colonial society.
>
> Enfranchisement, which meant freedom from the protected status associated with being an Indian, was seen as a privilege. There was thus a penalty of six months' imprisonment for any Indian falsely representing himself as enfranchised. Only Indian men could seek enfranchisement. They had to be over 21, able to read and write English or French, be reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners. . . . As an encouragement to abandon Indian status, an enfranchised Indian would receive indi-

> vidual possession of up to 50 acres of land within the reserve and his per capita share in the principal of treaty annuities and other band moneys.
>
> . . .
>
> Enfranchisement was to be fully voluntary for the man seeking it. However, an enfranchised man's wife and children would automatically be enfranchised with him regardless of their wishes, and would equally receive their shares of band annuities and moneys. They could not receive a share of reserve lands.[18]

Thus, the animating idea behind enfranchisement was that, if an Indian could function in mainstream society, he should be able, and indeed encouraged, to do so, since the government's ultimate aim was full absorption of Indian people into Canadian society. This basic policy principle was openly reflected in the *Indian Act* up until the repeal of the enfranchisement provisions in 1985.[19]

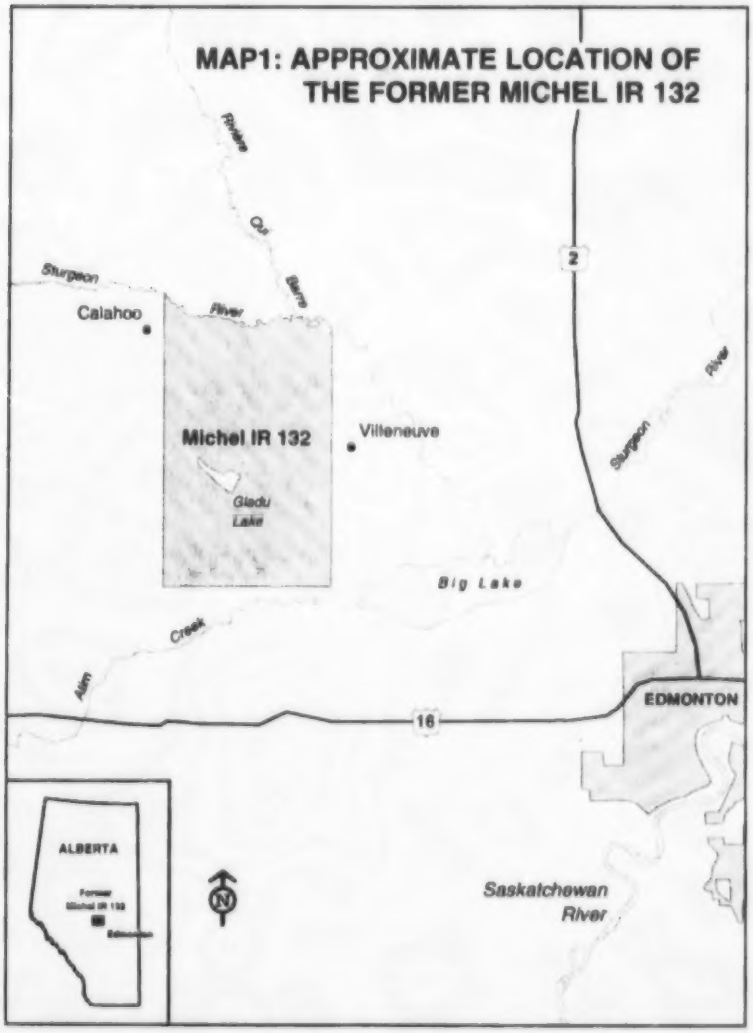
The first *Indian Act*, passed in 1876, carried forward the voluntary enfranchisement provisions in the *Gradual Enfranchisement Act* and added new measures in an effort to hasten the assimilation process, given that voluntary enfranchisement had proved unpopular among Indians. For example, section 86 of the *Act* provided for the involuntary enfranchisement of any Indian who became a doctor, lawyer, or clergyman, or who obtained a university degree.[20] Under section 93, an entire band could become enfranchised. In addition, a provision of the 1869 *Gradual Enfranchisement Act* which stipulated that an Indian woman who married a non-Indian, along with any children of the marriage, would lose their Indian status and band membership was continued in the first *Indian Act*.

The basic thrust of the enfranchisement policy remained intact through successive *Indian Acts*, although the actual provisions were modified in various ways. The *Act* was amended in 1920 to allow for the compulsory enfranchisement of any Indian or Indians who were "fit for enfranchisement," with fitness determined by a board of examiners appointed by the Superintendent General of Indian Affairs. Compulsory enfranchisement was maintained through a major revision of the *Act* in 1951. Under section 112 of the 1951 *Act*, the Minister was given the power to appoint a committee of inquiry to report on the desirability of enfranchising an Indian or a band,

18 Royal Commission on Aboriginal Peoples, *Report*, 5 vols. (Ottawa: Minister of Supply and Services, 1996), vol. 1: *Looking Forward, Looking Back*, 271 (hereinafter the RCAP *Report*).

19 We are mindful of the criticism that Bill C-31 embodies an assimilationist policy, but in a disguised form. See RCAP *Report*, vol. 1, 304-07.

20 Note that this provision was changed two years later, through an amendment providing for the *voluntary* enfranchisement of Indians who obtained higher education.


MAP1: APPROXIMATE LOCATION OF THE FORMER MICHEL IR 132
Riviere Qui Barre
Sturgeon River
Calahoo
Michel IR 132
Villeneuve
Gladu Lake
2
Sturgeon River
Big Lake
Atim Creek
16
EDMONTON
ALBERTA
Saskatchewan River
N

whether or not the Indian or band applied for enfranchisement.[21] In addition, the Governor in Council could enfranchise a band under section 111, where the band applied for enfranchisement, was seen as capable of managing its own affairs, and a majority of the electors of the band signified their willingness to become enfranchised. The 1951 *Act* also saw the introduction of compulsory enfranchisement for any Indian woman "who is married to a person who is not an Indian."[22] This "woman marrying out" clause, section 12(1)(b), became the subject of numerous human rights challenges.[23]

Despite widespread recognition that the government's enfranchisement policy was blatantly discriminatory and colonial, enfranchisement remained part of the *Indian Act* through various revisions until 1985. Under section 109 of the 1985 *Act*, prior to the Bill C-31 amendments, an Indian person could be voluntarily enfranchised, and an Indian woman would be involuntarily enfranchised if she married a non-Indian:

> **109.**(1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian
>
> (a) is of the full age of twenty-one years,
> (b) is capable of assuming the duties and responsibilities of citizenship, and
> (c) when enfranchised, will be capable of supporting himself and his dependents,
>
> the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.
>
> (2) On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister, may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify.

21 The involuntary aspect of section 112 was removed in the 1960-61 version of the *Act*, so that the Minister could appoint a committee of inquiry only where a band had applied for enfranchisement.

22 Although the first *Indian Act* provided that a woman who married a non-Indian would lose Indian status and band membership, the practice was for bands and federal authorities to overlook their lack of status and for women to retain informal band membership, connection with their communities, even residence on the reserve in many cases, and receipt of treaty annuities. Enfranchisement brought with it not only loss of status, but forced sale or disposal of reserve lands, and a pay-out of the woman's share of band capital and treaty moneys. For a detailed discussion of how the 1951 *Act* worked to attempt to sever the connection between women who "married out" and their communities, see RCAP *Report*, vol. 1, 300-03.

23 The loss of status for women marrying out became notorious through the *Lovelace* case. After the marrying out provisions had survived a challenge based on the *Canadian Bill of Rights* (*Canada v. Lavell*, [1974] SCR 1349), Sandra Lovelace took the fight to the international arena. The Human Rights Committee of the United Nations found that the provisions violated the International Covenant on Civil and Political Rights.

In addition, sections 112 and 113 set out procedures for band enfranchisement. Section 112 provided as follows:

> **112.**(1) Where the Minister reports that a band has applied for enfranchisement and has submitted a plan for the disposal or division of the funds of the band and the lands in the reserve, and in his opinion the band is capable of managing its own affairs as a municipality or part of a municipality, the Governor in Council may by order approve the plan, declare that all the members of the band are enfranchised, either as of the date of the order or such later date as may be fixed in the order, and may make regulations for carrying the plan and the provisions of this section into effect.
>
> (2) An order for enfranchisement may not be made under subsection (1) unless more than fifty per cent of the electors of the band signify, at a meeting of the band called for the purpose, their willingness to become enfranchised under this section and their approval of the plan.[24]

Section 113 provided for the appointment of a committee, where a band had applied for enfranchisement, to inquire into and report to the Minister on the desirability of enfranchising the band, the adequacy of the plan for division of assets, or any other matter relating to the enfranchisement.

Finally, the legal consequences of enfranchisement were set out in section 110 of the 1985 *Act*:

> **110.** A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided for therein, be deemed not to be an Indian within the meaning of this Act or any other statute or law.

## BILL C-31

Bill C-31 was introduced in the House of Commons in 1985. The bill was designed to remove discrimination in the *Indian Act*, in accordance with the *Canadian Charter of Rights and Freedoms*, through the repeal of all enfranchisement provisions and the reinstatement of many of those Indian people who had lost status. It was also intended to allow band control over membership.

In tabling Bill C-31 for its second reading, David Crombie, then Minister of Indian Affairs and Northern Development, set out the principles underlying the bill:

24 This provision is essentialy the same as section 111 of the 1951 *Indian Act*.

> The legislation is based on certain principles . . . The first principle is that discrimination based on sex should be removed from the Indian Act.
>
> The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership. Those are the principles of the Bill.

Further in his speech, Minister Crombie said the following:

> This legislation also wipes out forever the concept of enfranchisement, which forced many Indian people to give up their status and band membership against their will. Incredibly, in the past some people lost their Indian status simply as a result of the fact that they enlisted in the Armed Forces, received a university education, or became a member of the clergy.

And further:

> While there may be other ways to reach these objectives, I have to reassert what is unshakeable for this Government with respect to this Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that Indian First Nations who wish to do so can control their own membership. These are the three principles which allow us to find balance and fairness . . .[25]

Initially, the concept of fairness embodied in the bill involved the reinstatement of status and band membership to women who married out and others who were involuntarily enfranchised on the basis of sex discrimination in the *Indian Act*. But over the course of the debate, it became clear that certain voluntary enfranchisements might also be considered unfair, given the social, economic, and cultural pressures that might have caused an Indian person to apply for enfranchisement. This issue then brought into play the conflict between remedying discrimination and recognizing a band's right to determine its own membership if it so desired. In particular, there was concern that it would not be fair for the government to reinstate band member-

25 Canada, House of Commons, *Debates* (March 1, 1985), 2644-46.

ship for those who had voluntarily enfranchised. For example, on June 10, 1985, Mr Penner, then Parliamentary Assistant to the Minister of Indian Affairs, made the following statements during a debate on Bill C-31:

> During the Committee hearings, we recognized that the distinction between voluntary and involuntary [enfranchisement] was a very false one because there were so many social, psychological, economic, and cultural pressures which might cause a person to so-called disenfranchise [sic]. But was that voluntary enfranchisement really voluntary? Did the person really know what he was doing? If the person was married and had children, did he sit down with his family to discuss the implications of this decision? We heard testimony which indicated that that did not occur.
>
> While Bill C-31 says we will allow Indian people to have their status restored, I do not think we can be selective about who will be able to have this opportunity as we were in the first version of Bill C-31. The Committee indicated we should extend this privilege to other persons who were disenfranchised or lost their Indian status so they can apply to the Registrar to have their status restored . . .
>
> In the name of justice, if we are going to extend the right to have status restored to some, we cannot make these artificial distinctions between those who relinquished their status voluntarily and those who relinquished their status involuntarily.[26]

In the end, the bill was amended to reinstate Indian status to voluntary enfranchisees, but to leave the matter of band membership for those individuals up to the bands that elected to assume control over the administration of their band lists under section 10 of the amended *Indian Act*. Thus, the current *Indian Act*, as amended by Bill C-31, distinguishes between those who were enfranchised because of their sex and whom they married, and those who lost their status for other reasons.

It is useful at this point to examine the status and membership provisions of the *Act*, found in sections 6 and 11:[27]

> **6.**(1) Subject to section 7 [*which sets out a list of those who are not entitled to be registered*],[28] a person is entitled to be registered if
>
> (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

26 Canada, House of Commons, *Debates* (June 10, 1985), 5568.

27 For ease of reference we have included in square brackets a brief explanation of the provisions that are referred to in section 6; a more detailed explanation is given in a footnote where necessary.

28 Under section 7, a non-Indian woman who was entitled to be registered under previous versions of the *Act* on the basis of marriage to a registered Indian man, and whose name was deleted from the Indian register, is not entitled to be registered.

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father's mother are not members of a band, known as the "double mother rule"*],[29] paragraph 12(1)(b) [*woman who married a non-Indian] or subsection 12(2) [illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(2) [*. . . by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;[30]

(d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(1) [*. . . by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,

(i) under section 13 [*ceased to be member of a band by reason of residence in foreign country*], as it read immediately prior to September 4, 1951, or under any former provision or this Act relating to the same subject-matter as that section, or

---

29 Jack Woodward, *Native Law* (Toronto: Carswell, 1989), 26, states that "[t]he 'double mother rule,' stated approximately, provided that when a woman obtained Indian status only by virtue of marriage to an Indian man, her son by that marriage could not pass on that Indian status to his children if he married a non-Indian. (The rule did not apply to the daughters of such marriages, because they had never been able to pass on Indian status unless they married an Indian. As well, the illegitimate children of such daughters could be removed from the list if there was a successful challenge of paternity.)"

30 The relevant portions of section 12 of the *Indian Act* RSC 1952, c. 149, are as follows:

**12.(1)** The following persons are not entitled to be registered, namely,
(a) a person who . . .
(iii) is enfranchised, or
(iv) is a person . . . whose mother and whose father's mother are [not entitled to be registered as Indians] . . ., and
(b) a woman who is married to a person who is not an Indian.

Section 109(2) of the *Indian Act* RSC, 1970, c. I-6, provides as follows:

**109.(2)** On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify.

(ii) under section 111 [*enfranchised because of post-secondary or professional education*], as it read immediately prior to July 1, 1920, or under any former provision or this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).[31]

Whereas section 6 sets out a list of those persons who are entitled to be registered as Indians, section 11 sets out additional rules governing who is entitled to band membership. It is important to observe that different rules apply where the band has assumed control of the band list from the Department of Indian Affairs. Section 11 states:

**11.**(1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) [*member of a band as declared by the Governor in Council*] as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(c) [*includes women who married a non-Indian; persons excluded by the double mother rule; illegitimate children of non-Indian father; Indian children who were enfranchised because their mother married a non-Indian*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

. . .

(2) . . . where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) [*ceased to be member of a band by reason of residence in foreign country*] or (e) [*enfranchised because of post-secondary or professional education*] and

31 Section 6(2) provides special registration rules for persons who are entitled to be registered where only one of their parents was entitled to Indian status under section 6(1). The effect of this provision is that a person who is registered under section 6(2) has a limited right to pass on Indian status to his or her children.

ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List . . .

To make sense of these provisions, it is important to appreciate that section 6 outlines those categories of Indians who are entitled to reinstatement of Indian status, and section 11 addresses the separate matter of band membership. Although some involuntary enfranchisees are entitled under Bill C-31 to reinstatement of both status and membership regardless of whether a band has assumed control of its band list, structurally the bill distinguishes between status and membership.[32]

More specifically, section 11(1) provides that a person is automatically entitled to have his or her name placed on a band list (i.e., is entitled to band membership) if that person is entitled to be registered as an Indian under paragraphs 6(1)(b) or 6(1)(c), regardless of whether the band list is maintained by the band itself or by the Department. To paraphrase the text of the statute, paragraph 6(1)(b) provides that persons are now entitled to be registered if they belong to a group that has been declared a band after April 17, 1985, and paragraph 6(1)(c) states that they are entitled to Indian and band status if they were enfranchised involuntarily because they are women who married non-Indians, illegitimate children of a non-Indian father, Indian children enfranchised because their mother married a non-Indian, or their mother and paternal grandmother were not Indians (the "double mother rule"). But if a band has control of its list, under section 11(2) it is up to that band to decide whether people entitled to be registered under section 6(1)(d), (e), or (f), or 6(2) will be placed on its list.[33] Those subsections entitle persons to be registered if they had previously enfranchised voluntarily, if they lost registration because of residence in a foreign country, or if they were enfranchised because they received post-secondary or professional education. The band is free to deny these people membership with the band. Again, only if the band does not have control of the list do these categories

32 Mr Penner offered the following rationale for this distinction: "I would like to conclude that by drawing this distinction that the Minister drew between status and Band membership because we do not want this to be interpreted as imposing persons upon First Nations without their consent": Canada, House of Commons, *Debates* (June 10, 1985), 5570.

33 Section 10 of the *Indian Act* provides that a band "may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section . . ." Under section 9, a band list for each band is maintained in the Department until such time as a band assumes control of its band list.

of persons have the right to be placed on a band list maintained by the Department.

One final observation is that sections 6 and 11 of the *Act* do not expressly account for those who were enfranchised as part of a band's enfranchisement. The reason for this apparent gap is not clear from the record of parliamentary debates.

Before leaving the discussion of Bill C-31, we wish to comment on our use of extrinsic evidence. Although the parliamentary history of Bill C-31 is set out above by way of background, we are aware that it sets the stage for the statutory interpretation exercise that follows. Another reason for addressing this issue is that Canada objected to the use of parliamentary debates in this inquiry, arguing as a general principle of law that such evidence should not be considered by interpretive bodies in construing a statute.

While we agree that parliamentary debates are generally inadmissible according to the formal rule, an exception to that exclusionary rule is well established: although debates may not be relied on to determine the meaning of a specific provision, they may be relied on to clarify the context for the statute and the "mischief" that the statute was designed to address.[34] Our reliance on parliamentary debate to clarify the context of the adoption of Bill C-31 is well within the confines of this exception. Furthermore, we note that there is a trend towards the admissibility of this kind of extrinsic evidence. As explained by Pierre-André Côté in his text *The Interpretation of Legislation in Canada*:

> [T]his exception to the rule excluding extrinsic evidence implies that the rule is being totally abandoned, because in practice it is extremely difficult to distinguish cases where extrinsic evidence is being used "to interpret a statute" and where it is being used solely to establish "the context" of its adoption. The time is coming when we will no longer be concerned with the admissibility of extrinsic evidence, and where the debate will shift to the weight such materials should be accorded.[35]

Indeed, in the recent case of *St. Mary's Indian Band v. Cranbrook*,[36] the Supreme Court of Canada expressly referred to parliamentary debate in support of its interpretation of a provision in the *Indian Act*, without any discussion of the propriety of relying on extrinsic evidence. We note that Canada

34 P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991), 364-67.

35 Côté, *Interpretation of Legislation*, 366. Note that a similar view is expressed in another leading statutory interpretation text: see Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), 448-49.

36 *St. Mary's Indian Band v. Cranbrook* (1997), 147 DLR (4th) 385.

brought the *St. Mary's Indian Band* case to our attention after submitting its written argument.[37]

## FACTS RELEVANT TO THIS CLAIM

The following paragraphs set out certain facts required for the Commission to address the issue at hand. We set out only facts essential for the purposes of background, and to avoid any examination of the validity of the enfranchisements affecting the Michel Band. (Other questions regarding the validity of the 1928 and 1958 enfranchisements are excluded from the scope of this inquiry by agreement of the parties.) In other words, we are not prepared to make any findings of disputed fact in this inquiry relating to the validity of the enfranchisements.

The Michel Band entered into a treaty with Canada when Chief Michael Callihoo signed an adhesion to Treaty 6 in 1878.[38] In 1880, a 40-square-mile reserve was surveyed as Michel Indian Reserve (IR)132 on the Sturgeon River about eight miles from the Roman Catholic Mission at St Albert, northwest of Edmonton.[39] This reserve was confirmed by Order in Council PC 1151 on May 17, 1889.[40]

Over the years, the Michel Band membership was affected by individuals and families being enfranchised in accordance with the *Indian Act* provisions governing Indian status and band membership. A number of individuals would have been affected by the compulsory enfranchisement provisions of the various versions of the *Indian Act*. In addition, in 1928, 10 families were enfranchised pursuant to the recommendation of an Enfranchisement Board appointed by the Department of Indian Affairs under section 110 of the 1927 *Indian Act*.[41] On May 15, 1928, the Governor in Council declared those individual band members enfranchised.[42] Then, in 1958, further to the recommendations of a Committee of Inquiry appointed under section 112 of the

37 Richard Wex, Legal Services, DIAND, to Ron Maurice, Commission Counsel, Indian Claims Commission, September 3, 1997 (ICC file 2108-17-1).

38 *Copy of Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964) (ICC Documents, p. 1).

39 George A. Simpson, Surveyor, to the Superintendent General, December 1, 1880, in Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880" (ICC Documents, pp. 8-9).

40 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 64-65).

41 Enfranchisement Board to Commissioner Graham, July 15, 1927, in DIAND file E6015-D32, vol. 1 (ICC Documents, pp. 312-16), and Inspector Morison to Commissioner Graham, July 18, 1927 (ICC Documents, pp. 317-19).

42 Order in Council PC 35/811, DIAND file 774/20-3-132 (ICC Documents, pp. 384-85).

1952 *Indian Act*, the entire Michel Band was enfranchised.[43] Four members who were not considered able to support themselves were not enfranchised with the rest of the Band but were removed from the Michel Band List and transferred to the General List.[44] By 1962, all reserve lands and assets of the Michel Band had been distributed to its enfranchised members.[45]

As a result of the Bill C-31 amendments, approximately 660 individuals who are former members or descendants of the Michel Band have regained Indian status under section 6 of the *Act* and are currently listed on the Indian Register.[46] The evidence suggests that most, if not all, of these people are former members and descendants of those members who were enfranchised before 1958. Those band members and their descendants who were enfranchised with the entire Michel Band in 1958 were entitled to be registered only if they fell within one of the categories listed in section 6 of the *Indian Act*.

43 Order in Council PC 1958-375, March 18, 1958 (ICC Documents, pp. 811-18).

44 Marginal note on memorandum from H.M. Jones, Director, to Deputy Minister of Citizenship and Immigration, February 21, 1958 (ICC Documents, p. 803).

45 L.L. Brown, Special Assistant to the Director, to the Public Trustee, Province of Alberta, May 25, 1902 (ICC Documents, p. 874). It should be noted, however, that Mr Jerome Slavik brought forward new information on January 8, 1998, which may have a bearing on this issue. In the event that the Commission's report and recommendations in this inquiry do not lead to a resolution of the standing issue, this new information may become the subject matter of a subsequent inquiry into the validity of the 1928 and 1958 enfranchisements.

46 Submissions on Behalf of the Government of Canada, July 18, 1997, p. 21. Under section 5 of the *Indian Act*, the Department maintains an Indian Register, which records the name of every person who is entitled to be registered as an Indian under the *Act*.

# PART III

## ISSUES

The fundamental question before the Commission is whether the descendants and former members of the Michel Band are entitled to be recognized as a band under the *Indian Act*. For the purposes of defining the scope of the inquiry, the parties have agreed on the following assumption and statement of issues:

***Assumption:***
For the purposes of addressing this issue, and on a without prejudice basis or admission of fact, the Michel Indian Band ceased to exist as a Band under the *Indian Act* in 1958 as a result of the (band's) enfranchisement.

***Issue:***
Do the 1985 amendments to the *Indian Act*, when coupled with the other provisions of the *Indian Act*, impose upon Canada a statutory obligation to reconstitute the Michel Band as a Band under the *Indian Act*, providing it with standing to bring a claim under the Specific Claims Policy?

***Sub-Issues:***

i) Was Canada required as a matter of law to maintain a Band List for the Michel Indian Band after the 1958 enfranchisement?

ii) As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band List? Does being placed on a Band List constitute being a member of the Michel Band?

iii) If such a statutory obligation exists, does this reconstitute the Michel Indian Band?

iv) Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?

# PART IV

## ANALYSIS

### PRINCIPLES OF STATUTORY INTERPRETATION

The parties disagree on the general principles of interpretation applicable to statutes dealing with Indians. Since this inquiry is essentially an exercise in statutory interpretation, it is necessary to address this matter and to make our approach clear from the outset.

The Society argues that the *Indian Act* provisions at issue are capable of more than one interpretation, and, based on *Nowegijick v. The Queen*,[47] that the ambiguity must be resolved in favour of the Indians. Canada submits that there is no ambiguity, and, moreover, that the *Nowegijick* principle does not apply to statutes but only to the interpretation of treaties. For that proposition, Canada relies on *Mitchell v. Peguis Indian Band*[48] and the recent Supreme Court of Canada case of *R. v. Lewis*.[49]

The *Nowegijick* principle is that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[50] The principle was refined in *Mitchell*, in which La Forest J identified the differences between treaties and statutes and explained how those differences affect the interpretation exercise. In view of the importance placed on this interpretive principle, it is useful to consider La Forest J's analysis at some length:

> I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a

47 *Nowegijick v. The Queen*, [1983] 1 SCR 29.
48 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.
49 *R. v. Lewis*, [1996] 1 SCR 921.
50 *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36.

> foreign language, and incorporated references to legal concepts of a system of law with which the Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.
>
> But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.
>
> . . .
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.[51]

Thus, the principle is not simply that any construction favouring the Indians ought to be accepted, because we still, of course, demand fidelity to the language and purpose of the statute. Statutes relating to Indians should be construed liberally, having regard for parliamentary intent as embodied in the text. It appears, therefore, that the Society's argument may oversimplify the matter somewhat. At the same time, however, Canada's assertion that the *Nowegijick* principle no longer applies in the context of statutory interpretation is clearly overstated.

In *Lewis*, the Supreme Court of Canada summarized the canons of interpretation of statutes relating to Indians, beginning with *Nowegijick* and *Mitchell*. The issue in *Lewis* was whether a band's power under the *Indian Act* to make by-laws for the management of fish "on the reserve" extended to a river immediately adjacent to the reserve. Iacobucci J, for the Court, approached the task by analyzing the wording, context, and purpose of the statutory provision. Making the point that these three elements must be reconciled, he rejected the argument that a broad, purposive construction of the phrase "on the reserve" was justified because the fishery is critical to the

51 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 143.

economic and cultural well-being of aboriginal people, and the general goal of the *Indian Act* is to protect the "sustaining practices" of aboriginal people. Iacobucci J stated that, although the suggested interpretation "goes further towards achieving Parliament's objective of protecting and maintaining Indian rights, it is not an interpretation supported on the language or goal of the section."[52]

In summary, then, while statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation. This basic principle of statutory interpretation guides the analysis that follows.

We now go on to discuss the main issue in this inquiry, namely, whether the 1985 amendments to the *Indian Act* impose a statutory obligation on Canada to reconstitute the Michel Band as a Band within the meaning of the *Indian Act* and the Specific Claims Policy.

## SUB-ISSUE 1: STATUTORY OBLIGATION TO MAINTAIN MICHEL BAND LIST

Was Canada required as a matter of law to maintain a Band List for the Michel Indian Band after the 1958 enfranchisement?

The Society argues that Canada is required, under the *Indian Act*, to maintain a band list for the Michel Band even though (we are assuming that) the Band ceased to exist in 1958 and therefore all the names on the list were deleted. The Department has been required since 1951 to maintain a band list for each band and to record all additions and deletions. These requirements are now found in sections 8 and 9 of the *Act*, which read as follows:[53]

> **8.** There shall be maintained in accordance with this Act for each band a Band list in which shall be entered the name of every person who is a member of that band.
>
> **9. (1)** Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.
>
> (2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

52 *R. v. Lewis*, [1996] 1 SCR 921 at para. 77.
53 All relevant statutory provisions are contained in Appendix B to this report.

> (3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

According to the Society, there is nothing in section 9 or any other provision of the *Act* that permits the Department to destroy a band list, nor is there any indication that the requirement to maintain a band list does not continue even if all names have been deleted.

Furthermore, the Society points out that the Department does in fact have a list of former Michel Band members, which it needs for administrative purposes. Thus, the existence of a band list in perpetuity makes practical as well as legal sense. Overarching all of these arguments is the principle, advanced by the Society, that any interpretation of section 8 and 9 must further the purpose of the Bill C-31 amendments, which is to "eliminate and remedy the effects of the discriminatory enfranchisement provisions of the *Indian Act* by restoring Indian status and band membership to those individuals who applied to regain these rights."[54]

Canada argues simply that, where there is no band and there are no members, there is no obligation under section 8 of the *Indian Act* or any of its predecessors to maintain a band list. In support of its position, Canada relies on the wording, context, and purpose of section 8. Beginning with an analysis of the language of the provision, Canada notes that section 8 requires that a band list be maintained "for each band," not "for each band and any former band." Section 8 also requires the Department to record the name of "every person who is a member of that band," not "is or was" a member of that band. Canada asserts, therefore, that the Society's purposive interpretation cannot be supported by the wording of section 8. In addition, other sections of the *Act* that address band lists and band control over lists, such as sections 10 and 14, presume the existence of a band. The contextual approach to interpretation demands that "band list" be accorded a consistent meaning throughout the *Act*, but the prospect of a band list for a non-existent band makes no sense in the context of the *Act* as a whole.

As to the point that a list for the Michel Band actually exists, Canada submits that an historical or administrative record showing that all of the names of Michel Band members were struck out does not amount to a band list within the meaning of the *Act*. Finally, Canada objects to the Society's characterization of the purpose of the Bill C-31 amendments, in that the amend-

54 Submission on Behalf of the Michel Society, June 27, 1997, p. 20.

ments clearly distinguish between status and membership and provide for certain individuals to be restored only to Indian status without band membership.

Although we think that Canada is correct in saying that Bill C-31 contemplated a distinction between status (section 6) and membership (section 11), depending on enfranchisement category, we agree with the Society that it would be consistent with the purpose of Bill C-31 to reinstate Indian status and band membership to at least those former Michel Band members who were affected by the "woman marrying out" provisions. To further that clear purpose – remedying past sex discrimination – there must be a Michel Band list. The difficulty, however, is that the purposive approach urged upon us by the Society cannot be supported by the wording of section 8.

Section 8 imposes an obligation on Canada to maintain a band list "in accordance with this Act *for each band*." On our reading of this language, it is apparent that there must be a band in existence for the section 8 obligation to take hold. We agree with Canada that it would have been easy for Parliament to have included former bands in section 8 if it had been the intention to maintain band lists for any band ever in existence. Furthermore, although it is true that there is no provision in the *Indian Act* allowing the Department to destroy or discontinue band lists, in our view the absence of a direct expression of such power does not alter the analysis. A list of deleted names of members of a band that no longer exists simply ceases to be a band list, without any exercise of a positive power of destruction or discontinuance that needs explicit statutory sanction. Finally, we have to agree with Canada that the continued existence for administrative purposes of a list of deleted names of Michel Band members does not mean that a band list, as defined under the terms of the *Indian Act*, exists.

The assumption, for the purposes of this inquiry, is that the Michel Band ceased to exist as a band under the *Indian Act* in 1958; therefore, since 1958 there has been no band on which to predicate Canada's obligation to maintain a band list. Consequently, we conclude that Canada was not required to maintain a band list for the Michel Band after the 1958 enfranchisement. To hold otherwise would be to strain the words of the section to achieve a certain purpose, an approach that is inconsistent with the *Lewis* case.

## SUB-ISSUE 2: STATUTORY OBLIGATION TO PLACE NAMES ON MICHEL BAND LIST

As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band list? Does being placed on a band list constitute being a member of the Michel Band?

Having determined that Canada was not required to maintain a band list for the Michel Band under section 8, we are asked to consider whether section 11 of the *Act* creates an obligation on Canada to place members of the Society on a Michel Band list. Recall that the Bill C-31 amendments entitle certain individuals, such as those in the "women marrying out" group, to reinstatement of both Indian status and band membership. Under section 11, such an individual is "entitled to have his name entered on a Band list maintained in the Department for a band." The Society submits that those of its members who have had Indian status reinstated under section 6(1)(c) and (d) are therefore *automatically* entitled to be placed on the Michel Band list. It further submits that band enfranchisees fall under section 6 and are entitled to be reinstated as well.

In response, Canada submits that the Society's argument is circular. Section 11 states that, in certain cases, individuals are entitled to have their names entered on a band list maintained in the Department for that band. But since there is no Michel Band and no Michel Band list, section 11 cannot apply. Canada says that the Society's argument somehow assumes the creation of a band by application of a section of the *Act* that requires a band to exist in the first place. Furthermore, the assertion that section 11 imposes a duty on Canada to constitute a band list for a band that does not exist is inconsistent with, and undermines, the Minister's discretionary power under section 17 of the *Act* to create bands and band lists.[55]

What we are being asked to consider here is whether the Bill C-31 amendments should be interpreted so that the Michel Band enfranchisees, and those affected by individual enfranchisement prior to 1958, are placed on the same footing as all other Indians who were enfranchised. The problem, in

---

55 Section 17 provides, in part, as follows:
17.(1) The Minister may, whenever he considers it desirable,

. . .

(b) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.

the case of the claimants, is that the Michel Band ceased to exist in 1958 and, as explained above, there is no Michel Band list. Another problem is that the Bill C-31 amendments do not specifically address band enfranchisement; although section 6 explicitly refers to the statutory provisions under which individuals were enfranchised, it contains no reference to the band enfranchisement provisions of the 1951 *Indian Act* or any former *Act*.

The Society maintains that we should approach this problem from the perspective of the purpose of Bill C-31. The mischief that Bill C-31 was intended to remedy was discrimination created by the enfranchisement provisions in the *Indian Act*. Since band enfranchisement grew out of the same assimilationist and colonial policy as individual enfranchisement, the Society argues that fidelity to the purpose of the amendments demands that band enfranchisees not be deprived of the remedy (i.e., reinstatement of Indian and band status) available to others who are similarly situated. And those former Michel Band members and descendants who were enfranchised prior to 1958, and took no part in the band enfranchisement proceedings, should not be deprived of the benefits of Bill C-31 (i.e., reinstatement of status and, in many cases, membership) to which they would otherwise be entitled. The Society also relies on the principle that statutes must be interpreted in a manner consistent with the constitutional values embodied in the *Charter* and section 35 of the *Constitution Act, 1982*.

We are troubled by the prospect of former Michel Band members who were, for example, involuntarily enfranchised by "marrying out" being unable to regain membership in a band, and thus remaining disadvantaged as a result of past discrimination that was intended to be remedied. That result appears to be inconsistent with the overall objectives of Bill C-31. Similar considerations apply to band enfranchisees, who were subject to the same broadly discriminatory policy.[56] Nevertheless, we cannot accept the interpretation of sections 6 and 11 urged upon us by the Society. We recognize that the suggested interpretation advances the purpose of Bill C-31, but we are constrained by the language of the statute.

Section 11 provides that under certain circumstances "a person is entitled to have his name entered in a Band list maintained in the Department for a band." The Society's argument, in essence, is that the creation of a Michel Band list results by necessary implication from the operation of that section.

56 If we accept Canada's argument, the practical impact on the Michel Society members is that (1) those members who were enfranchised as part of the band in 1958 are not entitled to be reinstated as Indians; and (2) some 660 members who were reinstated by virtue of Bill C-31 because they fall within the categories recognized under section 6 are not entitled to be placed on the Michel Band list because there is no band.

In our view, the creation of a band list, which in turn requires the existence of a band, is simply too significant and complex an effect to be implicit. The act of creating or reconstituting bands or band lists is governed by specific sections of the *Act* and cannot flow from section 11 *per se*.

We are also of the opinion that band enfranchisees do not fall within the ambit of section 6(1), the relevant portions of which are reproduced below for ease of reference:

> **6.**(1) Subject to section 7, a person is entitled to be registered if
>
> . . .
>
> (c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father's mother are not members of a band, known as the "double mother rule"*], paragraph 12(1)(b) [*woman who married a non-Indian] or subsection 12(2) [illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(2) [*. . . by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, *or under any former provision of this Act relating to the same subject-matter as any of those provisions*;
>
> (d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(1) [*. . . by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, *or under any former provision of this Act relating to the same subject-matter as any of those provisions*;
>
> . . .

The Society submits that band enfranchisees do fall within the scope of section 6(1)(c) and (d) by virtue of the emphasized phrase "under any former provision of this Act relating to the same subject matter as any of those provisions." The argument is that band enfranchisement and individual enfranchisement relate to the same subject matter – enfranchisement generally – and therefore band enfranchisement is caught by section 6. Canada contends, however, that

> the reference in section 6 to "any former provision of this Act relating to the same subject matter" clearly refers to earlier *Indian Act* provisions dealing with individual

(married women and individual application) enfranchisements, such as s. 99 of the *Indian Act*, S.C. 1880, c. 28; s. 82 of the *Indian Act*, S.C. 1886, c. 42; and s. 108 of the *Indian Act*, R.S.C. 1952, c. 148, none of which would have been caught in the absence of that concluding phrase.

If, as is argued by the Society, the concluding phrase had the effect of including band enfranchisements, there would have been no need for paragraph 6(1)(d) or (e) as all aspects of enfranchisement (including all categories of individual enfranchisement and band enfranchisements) would have been caught by the concluding phrase in paragraph 6(1)(c). Thus it is Canada's position that the purpose and legal effect of the concluding phrase in paragraph 6(1)(c) and 6(1)(d) was not to include every category of enfranchisement but rather to include the married woman/individual application enfranchisements which had taken place under earlier versions of the *Indian Act*.[57]

We agree with Canada's submissions on this point. As we read it, the emphasized phrase is simply the means by which the legislative drafter avoided having to list every predecessor, in every former version of the *Indian Act*, to the specific sections listed. The phrase does not function to broaden the ambit of the provision to include band enfranchisement. Furthermore, if Parliament had intended to reinstate all categories of Indians enfranchised under the repealed sections of the *Indian Act*, that intention could have been stated clearly and simply without the need to draw the fine distinctions between the categories of enfranchisees that we see in Bill C-31.

It thus appears that there is a gap in the legislation. Although the intention of remedying past discrimination is clear, and former Michel Band members lost their Indian status as part of the government's policy to assimilate Indians into mainstream Canadian society, it remains that Parliament simply did not account for band enfranchisement (perhaps because there were only two band enfranchisements in the entire history of the *Indian Act*). The actual language of the *Act* is under-inclusive – that is, it is silent on band enfranchisement. Is it possible, then, to fill the gap by adopting a broad and remedial construction of Bill C-31?

Generally speaking, courts are reluctant to add a missing provision to a statute to bring it in line with its purpose.[58] Although it is permissible to go beyond the written words of a statute to render explicit that which is implicit, it is not permissible to interpret a statute so as to usurp the role of the legislature. It would be inappropriate, therefore, for the Commission to inter-

57 See Submissions on Behalf of the Government of Canada, July 18, 1997, pp. 25-26. The emphasis is in the original.

58 See Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), 128, and P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991), 333-39.

pret the Bill C-31 amendments so as to fill the gap. Moreover, one might contend that in this case there is no real legislative gap, since the band's enfranchisement problem (i.e., an entitlement to membership but effectively nowhere to go since there is no Michel Band or band list in existence) could be dealt with by way of section 17 and the Minister's power to create new bands.

In the end, having considered all of the arguments, we conclude that Canada has no statutory obligation to place the names of all former Michel Band members or descendants who have regained status on a Michel Band list. We also conclude that section 6 does not apply to band enfranchisees.

As for the second prong of this sub-issue, we conclude that being placed on a band list, or being entitled to be placed on a band list under section 6, can constitute band membership only if a band list already exists under the terms of the *Act*. On the basis of that line of reasoning, the definition of "member of a band" in section 2(1) of the *Act* as "a person who is entitled to have his name appear on a band list" does not operate to create a band, as the Society asserts, but is predicated on the existence of a band.

### SUB-ISSUE 3: MEMBERSHIP AND BAND RECONSTITUTION

If such a statutory obligation exists, does this reconstitute the Michel Indian Band?

The *Indian Act* defines "band" in section 2(1) as follows:

> **2.** (1) In this Act
> "band" means a body of Indians
>
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> (c) declared by the Governor in Council to be a band for the purposes of this Act;

The question we are asked here is whether a statutory obligation to place names on a Michel Band list operates to reconstitute the Michel Band. The starting point of the analysis must be that the Bill C-31 amendments must be read within the context of the *Act* as a whole. If the Bill C-31 amendments operate to reconstitute the Michel Band, they must do so in a manner consistent with the other provisions of the *Act*, including the definition of "band" in

section 2(1). In other words, sections 6 and 11 cannot reconstitute the Michel Band if the statutory requirements laid out in section 2(1) are not met.

The Society submits that the former members and descendants of the Michel Band are a band within the meaning of the *Indian Act* because they are a "body of Indians" who had reserve lands set aside for them at one time. In support of its argument, the Society refers to section 2(2) of the *Act*:

> 2.(2) The expression "band" with reference to a reserve or surrendered land means the band for whose use and benefit the reserve or the surrendered lands were set apart.

The point of raising this section is to demonstrate that a band does not cease to exist under the *Indian Act* simply because it is without reserve land. Furthermore, the Society notes that, if it is ultimately successful in its claim against Canada for, *inter alia*, the illegal surrender of reserve land, Canada will hold moneys and lands in trust for its members, and the definition of "band" will be met through subsection (a) and (b).

Canada's response to this argument is that the language of section 2(1) "band" (a) plainly demands that a band continue to hold reserve land. The section refers to lands that "have been set apart," not "had been or were set apart." As Canada points out, the phrase "have been set apart" uses the present perfect form of the verb which indicates a reference to a past event with a continuation in the present. Canada's position that lands must continue to be set apart for the body of Indians is further supported by the words "lands . . . the legal title to which is vested in Her Majesty" in section 2(1) "band" (a). Moreover, the logical result of the Society's argument – that any band that ever had reserve land set aside for it will continue to exist as a band under the *Indian Act* – suggests that the argument is untenable. The fact of the matter is that bands do cease to exist, for example, through the process of amalgamation.

Having considered the parties' submissions, we find that the claimants do not satisfy the definition of "band" under the *Act*. Reading the text of section 2(1) "band" in a common sense way, we are of the view that a band is a body of Indians which has had lands set aside and continues to hold those lands. The alternative, expansive approach to interpretation of the section requires that we accept the proposition that bands exist in perpetuity if they ever had reserve lands set aside. We cannot accept that proposition. In addition, we are of the view that section 2(2) does not assist the Society in any

way. That provision is engaged only in connection with other provisions of the *Act* dealing with reserves or surrendered lands, and does not alter or conflict with the basic definition of "band" set out in section 2(1). As to the application of section 2(1) "band" (b), we decline to make any finding on whether the Michel Band exists on the basis of a possibility that moneys will be held in trust for the members if their specific claim is successful because the parties agreed that this issue would not be addressed in this inquiry. All of these considerations lead us to the conclusion that the Bill C-31 amendments do not reconstitute the Michel Band.

## SUB-ISSUE 4: STATUTORY OBLIGATION TO RECOGNIZE MICHEL BAND

Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?

Based on the analysis under sub-issues 1 through 3 above, there is no obligation on the part of Canada to recognize those former Michel Band members and descendants who have regained status as a band under the *Indian Act*. That conclusion effectively determines whether the Society is eligible to bring a claim under the Specific Claims Policy.

As noted at the outset of this report, the Specific Claims Policy contemplates claims by a band or bands, not individuals or other groups. In the *Young Chipeewayan Inquiry*, the Commission concluded that the Policy does not afford individuals or groups of individuals redress unless they are a band within the meaning of the Policy.[59] The Commission went on to state that "it is the definition of 'band' under the *Indian Act* that is most relevant to the Specific Claims Policy."[60] However, the question of whether the claimants in that case were a band at common law was also considered.

In addition to reasserting its argument that the Michel Band was reconstituted by the Bill C-31 amendments, the Society argues that it is a band at common law and that a broad definition of "band" is contemplated under the Policy. Canada not only rejects that argument but objects to its being raised,

59 ICC, *The Young Chipeewayan Inquiry Report into the Claim Regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reprinted (1995) 3 ICCP 175 at 196.

60 ICC, *The Young Chipeewayan Inquiry Report into the Claim Regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reprinted (1995) 3 ICCP 175 at 197.

since the focus of this inquiry has been Canada's *statutory* obligation. Canada's position is that the common law argument represents a departure from the agreed statement of issues and should not be considered in the context of this inquiry.

Our view is that we are constrained by the terms of the agreed statement of issues as well as the lack of evidence and argument on the issue of whether the Society is a band at common law. That leaves only the matter of status determined under the *Act*. Since the Society is not a band under the *Indian Act*, we must conclude that it lacks standing to bring a claim under the Specific Claims Policy.

## FAIRNESS IN THE RESULT: THE COMMISSION'S SUPPLEMENTARY MANDATE

Based on the facts and arguments before the Commission in this inquiry, we have concluded that the Government of Canada is not legally obligated to recognize the Friends of Michel Society as a band under the provisions of the *Indian Act*. However, because we have reservations about the fairness of this result, we have decided to exercise our discretion to make a supplementary recommendation to the Minister of Indian Affairs. In light of the unique and anomalous circumstances in this case, we feel justified in relying on the Commission's supplementary mandate, which was first described in 1991 by the former Minister of Indian Affairs, Tom Siddon, in the following terms:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly *but the outcome is nonetheless unfair*, I would again welcome its recommendations on how to proceed.[61]

In an October 13, 1993, letter to then Chief Commissioner Harry LaForme, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the government's proposed approach on how to respond to the recommendations of the Commission:

> (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the Commission's recommendations on

61 Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991, reprinted in (1995) 3 ICCP 244-46. Emphasis added.

> how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair . . .[62]

As mentioned above, our conclusion, based on the narrow legal issue put before us, is that Canada has no legal obligation to reconstitute the Michel Band, and the Society has no standing to bring a claim under the Specific Claims Policy. The consequence of this conclusion, however, is that the Michel Society may have no practical means of recourse to address its claims against Canada, since the obstacles of litigation are often too substantial for this to be a viable alternative. If the Michel Society is correct in its assertions that certain surrenders of reserve land by the Michel Band in the early 1900s were improper and invalid (and we make no findings on these assertions), the Society's lack of recourse would result in manifest unfairness in that it would allow Canada to ignore its legal obligations and not have to account for the damages suffered by the Michel Band and its descendants. The Michel Society expressed the concern in these terms:

> Given the purpose of the [Specific Claims] policy and the nature of the relationship between the Crown and aboriginal bands (in the anthropological sense), we submit it is not reasonable or consistent with fair dealing and the honour of the Crown to deny standing to the Michel Band to bring a claim. This is particularly so because the crown is seeking to rely on the effects of a very discriminatory provision (s. 112) which it has, itself, recognized violates human rights and which is of the some [sic] nature and effect as the enfranchisement provisions which were repealed and ameliorated in 1985. This is also particularly so because the claims which the Michel Band seeks to establish relate to the very event, the 1958 enfranchisement, which Canada is using to bar the Michel Band's claim. The Band has a strong claim based on wrongful enfranchisement, illegal termination of treaty rights and wrongful surrender and disposition of reserve lands and assets in connection with the 1958 enfranchisement. Surely the Crown cannot rely on its own wrongful act to bar the bringing of a claim for redress of that wrong.[63]

The Commission, of course, makes no findings on the merits of these other claims. We do, however, have serious reservations about the fairness of Canada's position that the Michel Society does not have standing to bring a claim under the Policy. Such a decision may, in effect, immunize Canada from the legitimate claims of a group of Indians who contend that they still

62 Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993, reprinted in (1995) 3 ICCP 242-43.
63 Submissions on Behalf of the Michel Society, June 27, 1997, pp. 37-38.

stand in a fiduciary relationship with the Crown. Furthermore, it is our view that this result, although correct from a technical legal perspective, is unfair because it might allow Canada to benefit from the effect of enfranchisement provisions that were repealed in their entirety in 1985.

Viewed in this light, we think it would be inappropriate for Canada to stand on its technical legal advantage in this case. That advantage is derived from the fact that the Band was enfranchised in combination with the strictures of the Specific Claims Policy and what may be a gap in the Bill C-31 amendments. In our view, Canada should consider the specific claims of the Michel Society on their merits. Such an approach is not only consistent with the thrust of the Specific Claims Policy and the Crown's fiduciary relationship with aboriginal peoples but also consonant with the spirit of the Bill C-31 amendments, which sought to eradicate the concept of enfranchisement and to remedy its discriminatory effects.

# PART V

## FINDINGS AND RECOMMENDATION

### FINDINGS

The Commission has been asked to inquire into and report on whether Canada has a statutory obligation to recognize the Michel Band as a band under the *Indian Act*, providing it with standing to bring a claim under the Specific Claims Policy. For the purposes of addressing this issue the parties agreed to assume, on a without prejudice basis, that the Michel Band ceased to exist as a band under the *Indian Act* in 1958 as a result of the band's enfranchisement. The parties also agreed that the main issue raised four sub-issues.

Our findings on each of the sub-issues are summarized as follows.

**Sub-Issue 1: Statutory Obligation to Maintain Michel Band List**
Was Canada required as a matter of law to maintain a band list for the Michel Indian Band after the 1958 enfranchisement?

Section 8 of the *Indian Act* imposes an obligation on Canada to maintain a band list "in accordance with this Act *for each band*." In our view, it is apparent from the language of this section that there must be a band in existence for the obligation to maintain a list to take hold. If Parliament had intended to ensure that band lists were maintained for any band ever in existence, it could have easily extended the section 8 obligation to include "each band and any former band." Since the assumption, for the purposes of this inquiry, is that the Michel Band ceased to exist in 1958, there is no band on which to predicate Canada's obligation to maintain a band list. We conclude, therefore, that Canada was not required as a matter of law to maintain a band list for the Michel Indian Band after the 1958 enfranchisement.

**Sub-Issue 2: Statutory Obligation to Place Names on Michel Band List**

As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band list? Does being placed on a band list constitute being a member of the Michel Band?

Having determined that Canada was not required to maintain a band list for the Michel Band under section 8, we were then asked to consider whether sections 6 and 11 of the *Indian Act* create an obligation to place members of the Society on a Michel Band list. Section 11 provides that certain individuals reinstated to Indian status under section 6 are entitled to have their names entered on a band list maintained in the Department. The difficulty is that, although many members of the Society are entitled to reinstatement of Indian status under section 6, there is no Michel Band and no Michel Band list on which to enter their names under section 11. Furthermore, section 6 does not list band enfranchisees in the categories of individuals entitled to regain Indian status.

We appreciate that Bill C-31 was intended to remedy discrimination created by the enfranchisement provisions in the *Indian Act*, and if there is no obligation on Canada under sections 6 and 11 of the *Act* to place some members of the Society on a Michel Band list, those members remain disadvantaged as a result of past discrimination. At the same time, however, we are constrained by the language of the statute. Section 11 provides that, under certain circumstances, "a person is entitled to have his name entered in a Band List maintained in the Department for a band." But if there is no band list, the creation of such a list cannot result from the operation of section 11. The act of creating or reconstituting bands or band lists is governed by specific sections of the *Act* and cannot flow from section 11 *per se*.

If Parliament had intended to reinstate all categories of Indians enfranchised under the repealed sections of the *Indian Act*, that intention could have been stated in clear and simple language without the need to draw fine distinctions between the categories of enfranchisees we see in Bill C-31. Nor can the Commission fill in this gap with a broad and remedial construction of Bill C-31. Although it is permissible to go beyond the written words of a statute to render explicit that which is implicit, it is not permissible to interpret a statute so as to usurp the role of the legislature.





Therefore, it is our view that Canada has no statutory obligation to place the names of all former Michel Band members, or descendants who have regained status, on a Michel Band list. We also conclude, based on the plain language of the *Act*, that band enfranchisees do not fall within the scope of the Bill C-31 amendments. Finally, we conclude that being placed on a band list can constitute band membership only if a band already exists under the terms of the *Act*.

**Sub-Issue 3: Membership and Band Reconstitution**

If such a statutory obligation exists, does this reconstitute the Michel Indian Band?

If the Bill C-31 amendments operate to reconstitute the Michel Band, they must do so in a manner consistent with the other provisions of the *Act*, including the definition of "band" in section 2(1). The relevant portion of that section defines "band" as "a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951 . . ." We find that the Society does not satisfy this definition of "band." If we read the text in a common sense way, a band is a body of Indians that had lands set aside at some point *and* that continues to hold those lands. Any other interpretation would mean that bands will exist in perpetuity under the *Indian Act* if they ever had reserve lands set aside. We conclude, therefore, that the Bill C-31 amendments do not reconstitute the Michel Band.

**Sub-Issue 4: Statutory Obligation to Recognize Michel Band**

Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?

Based on the analysis under sub-issues 1 through 3 above, we conclude that there is no statutory obligation on the part of Canada to recognize those former Michel Band members and descendants who have regained status as a band under the *Indian Act*. Furthermore, since the Specific Claims Policy contemplates claims by a band or bands, not individuals or other groups, the Society is not, strictly speaking, eligible to bring a claim under the Specific Claims Policy.

## FAIRNESS IN THE RESULT: THE COMMISSION'S SUPPLEMENTARY MANDATE

As noted above, the mandate of the Commission includes a supplementary mandate to make recommendations to the government where we conclude that the Specific Claims Policy was implemented correctly, from a strictly legal point of view, but that the outcome is nonetheless unfair. In the light of this supplementary mandate, we offer the following additional comments and recommendation.

Our conclusion, on the narrow legal issue put before us, is that Canada has no statutory obligation to recognize or reconstitute the Michel Band, and the Society has no standing to bring a claim under the Specific Claims Policy. The consequence of this conclusion, however, is that the Michel Society may have no practical means of recourse to address its claims against Canada. If the Michel Society is correct in its assertions that certain reserve land surrenders by the Michel Band in the early 1900s were improper and invalid (again we make no findings on these assertions), this would result in manifest unfairness if Canada were allowed to ignore its legal obligations and not have to account for the damages suffered by the Michel Band and its descendants. Furthermore, it is our view that this result, although correct from a technical legal perspective, is unfair because it would allow Canada to benefit from past discrimination. The Michel Band was enfranchised and ceased to exist under those terms and in that context.

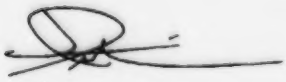
Viewed in this light, we think it would be inappropriate for Canada to stand on its technical legal advantage in this case. That advantage is derived from the fact that the Band was enfranchised in combination with the strictures of the Specific Claims Policy and what may be a gap in the Bill C-31 amendments. In our view, Canada should consider the specific claims of the Michel Society on their merits. Such an approach is not only consistent with the thrust of the Specific Claims Policy and the Crown's fiduciary relationship with aboriginal peoples but also consonant with the spirit of the Bill C-31 amendments, which sought to eradicate the concept of enfranchisement and to remedy its discriminatory effects.

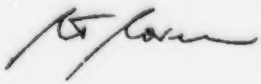
We therefore make the recommendation that follows.

## RECOMMENDATION

**That Canada grant special standing to the duly authorized representatives of the Friends of the Michel Society to submit specific claims in relation to alleged invalid surrenders of reserve land for consideration of their merits under the Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION





P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Dated this 27th day of March, 1998

# APPENDIX A

## FRIENDS OF THE MICHEL SOCIETY INQUIRY

| | | |
|---|---|---|
| 1 | **Request that Commission conduct inquiry** | March 1, 1995 |
| 2 | **Planning conferences** | July 26, 1995<br>March 22, 1996 |
| 3 | **Decision to conduct inquiry** | September 22, 1995 |
| 4 | **Notices sent to parties** | September 25, 1995 |
| 5 | **Community session** | December 17, 1996 |

The Commission heard from the following witnesses: Gilbert Anderson, Paul Callihoo, Napoleon Callihoo, Joanne Abbott, Beatrice Calliou, Albert Callihoo, John Calliou, Darlene Cust, Phyllis Hull, Elizabeth Gerlat, Christina Shennan, Nicole Callihoo.

**6 Content of the formal record**

The formal record for the Friends of the Michel Society Inquiry into the 1958 Enfranchisement Claim consists of the following materials:

- 21 exhibits tendered during the inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions from counsel for the Friends of the Michel Society and counsel for Canada
- transcripts from community session (1 volume)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

# APPENDIX B

## Relevant Provisions of *Indian Act*, RSC 1985

*Indian Act*, RSC 1985, c. I-5, as am.:

**2.**(1) In this Act

"band" means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

. . .

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

. . .

"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

**6.**(1) Subject to section 7 [*which sets out a list of those who are not entitled to be registered*], a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father's mother are not members of a band, known as the "double mother rule"*], paragraph 12(1)(b) [*woman who married a non-Indian*] or subsection 12(2) [*illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(2)

[. . . *by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised* . . .] pursuant to an order made under subsection 109(1) [. . . *by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,

(i) under section 13 [*ceased to be a member of a band by reason of residence in a foreign country*], as it read immediately prior to September 4, 1951, or under any former provision or this Act relating to the same subject-matter as that section, or

(ii) under section 111 [*enfranchised because of post-secondary or professional education*], as it read immediately prior to July 1, 1920, or under any former provision or this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

. . .

**8.** There shall be maintained in accordance with this Act for each band a Band list in which shall be entered the name of every person who is a member of that band.

**9.**(1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

. . .

**10.**(1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(a) after it has given appropriate notice of its intention to do so establish membership rules for itself; and

(b) provide for a mechanism for reviewing decisions on membership.

. . .

**11.**(1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) [*member of a band as declared by the Governor in Council*] as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(c) [*includes women who married a non-Indian; persons excluded by the double mother rule; illegitimate children of non-Indian father; Indian children who were enfranchised because their mother married a non-Indian*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

. . .

(2) . . . where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) [*ceased to be member of a band by reason of residence in foreign country*] or (e) [*enfranchised because of post-secondary or professional education*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph; . . .

. . .

**17.**(1) The Minister may, whenever he considers it desirable,

. . .

(b) constitute new band and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by person proposing to form the new bands.

# Indian Claims Commission

## Athabasca Chipewyan First Nation Inquiry
## W.A.C. Bennett Dam and Damage to Indian Reserve 201 Claim

### Panel

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Aurélien Gill

### Counsel

For the Athabasca Chipewyan First Nation
Jerome Slavik / K.E. Buss

For the Government of Canada
François Daigle

To the Indian Claims Commission
Ron S. Maurice / R. David House

**March 1998**

# CONTENTS

**PART I** ***INTRODUCTION*** 121
Background to the Inquiry 121
Mandate of the Indian Claims Commission 125
The Commission's Report 126

**PART II** ***HISTORICAL BACKGROUND*** 127
Peace-Athabasca Delta before Construction of the Bennett Dam 127
Unique Geography and Ecology of the Delta 127
Map 1: Peace-Athabasca Delta 129
Map 2: Area of Claim 130
The Chipewyan People and the Peace-Athabasca Delta 132
Treaty 8 134
Selection and Survey of Athabasca Chipewyan Indian Reserves 137
Map 3: Chipewyan Indian Reserve 201 143
Economy and Way of Life on Indian Reserve 201 144
Peace-Athabasca Delta after the Bennett Dam 147
Construction and Operation of the Bennett Dam 147
Government of Canada's Involvement in the Bennett Dam Project 152
Efforts to Mitigate Environmental Damage to the Delta 164
Impact of the Dam on the Delta and Indian Reserve 201 166

**PART III** ***ISSUES*** 173

**PART IV** ***ANALYSIS*** 175
Issue 1: Statutory and Fiduciary Obligations of the Federal Crown 175
Fiduciary Obligations of the Crown 175
General Fiduciary Principles 177
Scope for the Exercise of Discretion or Power 181
Unilateral Discretion or Power Affecting the First Nation's Legal or Practical Interests 198
First Nation Is Peculiarly Vulnerable to or at the Mercy of the Fiduciary 207
Standard of Care and Breach of Fiduciary Duty 210
Issue 2: Interference with Treaty Rights 216

**PART V** ***CONCLUSIONS AND RECOMMENDATION*** 218
Conclusions 218
Issue 1: Statutory and Fiduciary Obligations of the Federal Crown 218
Issue 2: Interference with Treaty Rights 222
Recommendation 222

***APPENDIX***
A Athabasca Chipewyan First Nation Inquiry 224

# PART I

## INTRODUCTION

### BACKGROUND TO THE INQUIRY

The purpose of this inquiry is to determine whether the Crown owes an outstanding lawful obligation to the Athabasca Chipewyan First Nation (First Nation)[1] in relation to damages sustained by the First Nation and to the Athabasca Chipewyan Indian Reserve (IR) 201 as a result of the construction and operation of the W.A.C. Bennett Dam (the Bennett Dam) in British Columbia.

On November 6, 1991, Chief Tony Mercredi wrote to Specific Claims West, Department of Indian Affairs and Northern Development (DIAND), advising it of the First Nation's proposed specific claim in relation to damages to its reserve and its livelihood caused by the drying out of the Peace-Athabasca Delta. The First Nation alleged that "the Minister of Indian Affairs has a statutory and fiduciary obligation for the proper management and environment protection of Indian Reserve lands" and a duty to the First Nation to prevent, mitigate, and compensate for environmental damage to IR 201 caused by the operation of the Bennett Dam. Chief Mercredi requested a meeting with federal officials to discuss whether a specific claim could be submitted to Specific Claims West for its consideration.[2]

In March 1992, a meeting was held to discuss the proposed claim, and it was agreed that further research and analysis would be required before Canada could decide whether an outstanding lawful obligation was owed to the First Nation. Rather than undertaking a costly research project, the First

1 Alternatively referred to as the "Athabasca Chipewyan," the "Athabasca Chipewyan Band," the "First Nation," "ACFN," or the "Band," depending on the historical context.

2 Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, November 6, 1991 (ICC Exhibit 2A, tab 1, ICC p. 421).

Nation proposed that Canada review the *prima facie* evidence[3] in relation to the claim, along with a preliminary legal opinion prepared by its legal counsel outlining the First Nation's position on the alleged legal and fiduciary obligations of the Crown.[4] On April 13, 1992, Mr Manfred Klein, Director of Specific Claims West, responded to Chief Mercredi's letter indicating that Canada would not make a decision based on the *prima facie* evidence alone, but that it would consider whether further research was necessary to decide either to accept or reject the claim for negotiation under the Specific Claims Policy.[5]

It is unclear whether there was agreement between Canada and the First Nation to conduct further research. On December 29, 1992, Mr Jerome Slavik, the First Nation's legal counsel, forwarded to Canada's negotiator a copy of a report prepared by an environmental consultant describing the impact of the Bennett Dam on the Peace-Athabasca Delta and on the Athabasca Chipewyan Indian Reserve 201.[6]

On March 9, 1993, Mr Slavik forwarded a legal opinion to Specific Claims on behalf of the First Nation. The First Nation claimed that the construction and operation of the Bennett Dam had caused a dramatic alteration to the unique ecosystem of the Peace-Athabasca Delta and to IR 201. Mr Slavik's letter summarized the First Nation's position in these terms:

> The Band maintains that the Crown knew, (or ought to have known), prior to construction, or shortly thereafter, of the adverse impacts that the WAC Bennett Dam would have on the #201 Reserve, but failed to take any measures to prevent, mitigate, or reduce the adverse environmental impact on the lands and waters of #201 Reserve and the economy of the Athabasca Chipewyan Band. In any event the Crown is now aware of the impacts and damages.
>
> It is the Band's position that the Crown was and is in breach of a continuing fiduciary and statutory obligation to prevent damage to the lands and waters of Indian Reserves. Specifically, the Crown is in breach of its obligations to ensure that activities and events which the Crown undertakes and over which the Crown exercises regula-

3 The term "prima facie evidence" is defined in Black's Law Dictionary, 5th ed. (St Paul: West Publishing, 1979), as "[e]vidence good and sufficient on its face; . . . Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence."

4 Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, March 18, 1992 (ICC Exhibit 2A, tab 4, ICC p. 430).

5 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, April 13, 1992 (ICC Exhibit 2A, tab 5, ICC p. 434).

6 Jerome Slavik, Ackroyd Piasta Roth & Day, to Jack Hughes, Negotiator, Specific Claims West, DIAND, December 29, 1992 (ICC Exhibit 2A, tab 7, ICC p. 438).

tory control do not destroy the environment, traditional or intended use, or economic value of Indian Reserve lands.[7]

On December 9, 1993, Mr Klein responded to a request from Mr Slavik regarding the status of the claim. He advised that no decision had been made, since a number of reports on the nature and extent of the dam's impact on the delta would not be completed until 1996, and that Canada also required a "historical report setting out the factual basis of the claim" and further legal submissions on the specific allegations against the Crown in right of Canada.[8] Chief Mercredi responded that research had been completed in relation to the claim, including a request for information through the federal *Access to Information Act*, and that copies of the historical documents had been furnished to Specific Claims West for its review. Accordingly, Chief Mercredi requested that the Department of Justice conduct its legal review of the claim based on the information and submissions presented to date.[9] On January 4, 1994, Mr Klein confirmed that the claim had been forwarded to the Department of Justice for legal review.[10]

On January 7, 1994, representatives of the First Nation and Canada met to discuss the possibility of referring the claim to the Indian Claims Commission for an inquiry into the relevant historical and legal issues.[11] Following an exchange of correspondence, Mr Jack Hughes, Research Manager for Specific Claims West, wrote to Chief Mercredi to advise him of Canada's preliminary position on the claim. The letter states that, based on the "exceptionally weak" historical documentation submitted, Canada's preliminary position was that the claim did not disclose an outstanding lawful obligation on the part of the federal Crown. There were essentially four grounds stated for rejecting the claim:

> The First Nation alleges that Canada did not warn or advise them before the construction of the dam that environmental damage might ensue, and that this evidence constitutes a breach of Canada's fiduciary obligation. In our view, the evidence sub-

7 Jerome Slavik, Ackroyd Piasta Roth & Day, to Manfred Klein, Director, Specific Claims West, DIAND, March 9, 1993 (ICC Exhibit 2A, tab 9, ICC p. 501).

8 Manfred Klein, Director Specific Claims West, DIAND, to Jerome Slavik, December 9, 1993 (ICC Exhibit 2B, tab 12, ICC p. 701).

9 Chief Tony Mercredi, Athabasca Chipewyan Band 201, to Manfred Klein, Director Specific Claims West, DIAND, December 17, 1993 (ICC Exhibit 2B, tab 13, ICC p. 706).

10 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, January 4, 1994 (ICC Exhibit 2B, tab 14, ICC p. 710).

11 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, January 11, 1994 (ICC Exhibit 2B, tab 15, ICC p. 712).

mitted does not indicate that Canada had explicit knowledge of any damage the First Nation might incur as a result of the dam until several years after its construction.

The First Nation alleges that Canada knew or ought to have known, at or shortly after the time of construction, that the dam would have severe adverse effects on Indian Reserve 201, and that Canada should have proposed mitigative or preventive measures. In our view, the evidence submitted by the First Nation does not indicate that Canada had any connection with the construction of the dam that might tend to suggest a fiduciary obligation in respect of the dam's affect on the First Nation.

The First Nation argues that Canada has an obligation to compensate or remediate them in respect of any damages they may have incurred as a result of the construction of the dam. In our view the evidence submitted by the First Nation suggest[s] that any such damages they may have incurred were caused exclusively by the actions of British Columbia and B.C. Hydro.

The First Nation alleges that there is a breach on Canada's part of its fiduciary obligation towards the First Nation in that it did not assist them in respect of their 1970 court action. In our view, the lack of evidence submitted by the First Nation does not make it possible to determine whether any request was communicated to Canada, nor do we have any evidence to indicate Canada's response to such a request.[12]

On July 28, 1994, Mr Klein confirmed an agreement in principle with Chief Mercredi to request that the Indian Claims Commission appoint a mediator to try to find a solution to the claim.[13] Unfortunately, the parties were not able to resolve the disputed issues despite the assistance of a mediator. Ultimately, on March 4, 1996, Chief Archie Cyprien requested that the Commission proceed with an inquiry into the claim.[14]

The Commission's inquiry commenced with a planning conference on May 17, 1996. Community sessions were held at Fort Chipewyan, Alberta, on October 10, 1996, and November 27, 1996. Written arguments were received from counsel for the First Nation on June 18, 1997. The Crown responded with its written arguments on September 8, 1997. Oral arguments were made by legal counsel for the First Nation and the Crown on September 30, 1997, in Edmonton, Alberta.

12 Jack Hughes, Research Manager, Prairies, Specific Claims West, to Jerome Slavik, May 24, 1994 (ICC Exhibit 2B, tab 21, ICC p. 730).

13 Manfred Klein, Director Specific Claims West, DIAND, to Chief Tony Mercredi, Athabasca Chipewyan Band 201, July 28, 1994 (ICC Exhibit 2B, tab 25, ICC p. 741).

14 Chief Archie Cyprien, Athabasca Chipewyan First Nation, to Dan Bellegarde and Jim Prentice, Co-Chairs, Indian Claims Commission, March 4, 1996 (ICC Exhibit 2B, tab 56, ICC p. 833).

## MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . ."[15] This Policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[16] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

It should be emphasized that the Commission is limited in its mandate and the Specific Claims Policy to making recommendations as to outstanding "lawful obligations" owed by the "federal government" to an "Indian band."

15 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

16 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

In view of our mandate, we decline to make any findings or recommendations regarding allegations against British Columbia or BC Hydro, as an agent of a provincial Crown. Furthermore, neither British Columbia nor BC Hydro participated in this inquiry, and it would not be appropriate for the Commission to offer its recommendations in relation to the alleged obligations of an entity or person that was not represented at, or a party to, our inquiry process.

## THE COMMISSION'S REPORT

The Commission has been asked to inquire into and report on whether the Athabasca Chipewyan First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. The Commission, however, has not been called upon to determine specifically whether the dam was the direct cause of the damage to IR 201.

By agreement of the parties, the Commission was to proceed on the assumption that the dam had caused damages to IR 201. However, the Commission did have the benefit of extensive technical analysis conducted by engineers, hydrological experts, biologists, and anthropologists, and many of these technical studies were co-sponsored by Canada. Those scientific studies, combined with the direct and anecdotal evidence from elders of the First Nation, provided the Commission with compelling *prima facie* evidence, which leads inescapably to the conclusion that significant environmental damage was sustained by the First Nation and IR 201. The construction and the operation of the Bennett Dam have substantially changed the hydrology and ecology of the Peace-Athabasca Delta, causing direct and serious harm to IR 201 and the Athabasca Chipewyan First Nation. No other conclusion is possible from the *prima facie* evidence before us.

Our review of the historical background, the oral submissions, and the applicable jurisprudence leads us to conclude that the Crown breached its fiduciary duty to the First Nation in not taking adequate steps to prevent or to mitigate the damages caused to IR 201 by the construction and operation of the W.A.C. Bennett Dam.

This report contains our findings and recommendations.

# PART II

## HISTORICAL BACKGROUND

The historical background to this claim is based on our review of a large volume of archival documents and exhibits submitted by the parties. This material includes several volumes of correspondence, expert scientific reports, and other documentary evidence, as well as testimony provided by members of the Athabasca Chipewyan First Nation and expert witnesses at community sessions held at Fort Chipewyan on October 10, 1996, and November 27, 1997. It should be noted that, although the Commission has consulted some secondary sources to supplement our understanding of issues that were not in dispute, it has relied for the most part on the materials submitted by the parties.

The Commission also considered the written submissions of the First Nation and Canada, in addition to hearing oral submissions from legal counsel for the parties on September 30, 1997. The documentary evidence, written submissions, transcripts from the community session and oral submissions, and the balance of the record before the Commission in this inquiry are referenced in Appendix A to this Report.

## PEACE-ATHABASCA DELTA BEFORE CONSTRUCTION OF THE BENNETT DAM

### Unique Geography and Ecology of the Delta

The Peace-Athabasca Delta, one of the largest freshwater deltas in the world, is formed by the convergence of the Peace, Athabasca, and Birch River systems, which empty into Lake Athabasca in northeastern Alberta (see Map 1, Peace-Athabasca Delta, on page 129). IR 201 takes up approximately 20,000 hectares of land in the eastern third of the delta (see Map 2, Area of Claim, on page 130). The flat landscape of the Peace-Athabasca Delta actually consists of two separate deltas and is characterized by its

> patchwork of marshes, lakes, mud flats, sedge meadows, willow and shrub thickets and forests of white spruce and balsam poplar, interwoven by numerous winding channels. With its variety of landforms and lush vegetation, the delta has the capacity to support a diverse mixture of animal species. In 1985, the Canadian Wildlife Service counted 220 species of birds, mammals and fish that inhabit the delta during some part of their lifecycle.[17]

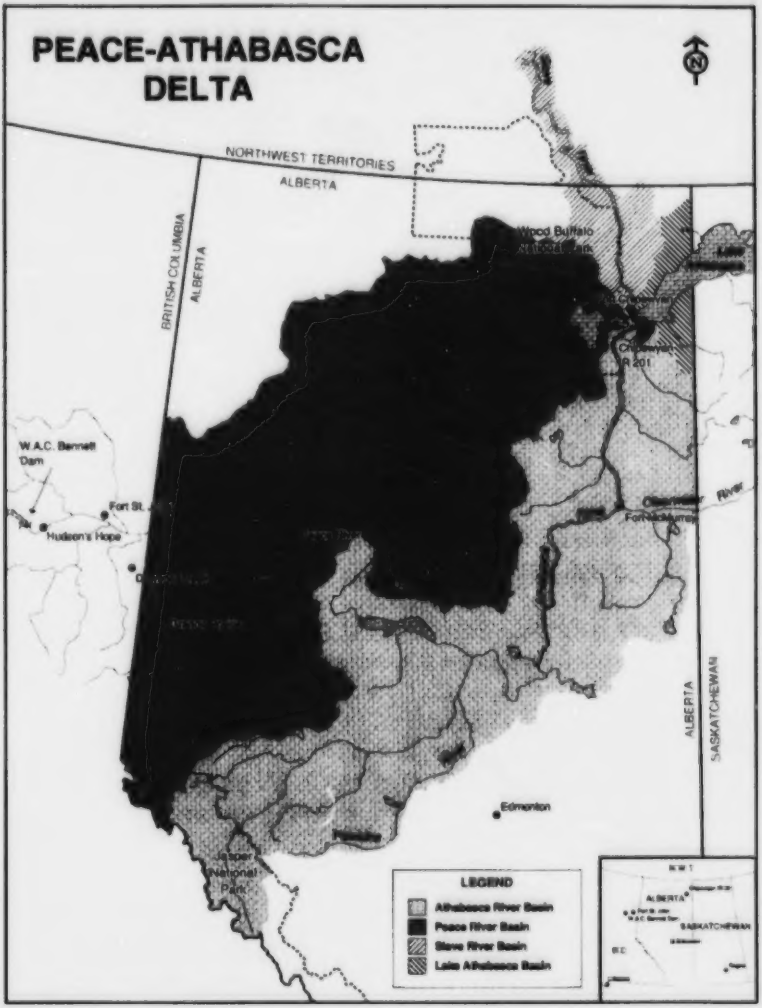
To understand fully the hydrology of the Peace-Athabasca Delta, one must first appreciate the geography of the two main rivers that feed the delta, the Peace and the Athabasca. The Peace River originates in the Rocky Mountains of British Columbia and cascades east across the province of Alberta. The Peace and the Smoky Rivers converge near the modern-day town of Peace River, Alberta, and continue northward, eventually converging with the Wabasca River and then reaching the Peace-Athabasca Delta.[18]

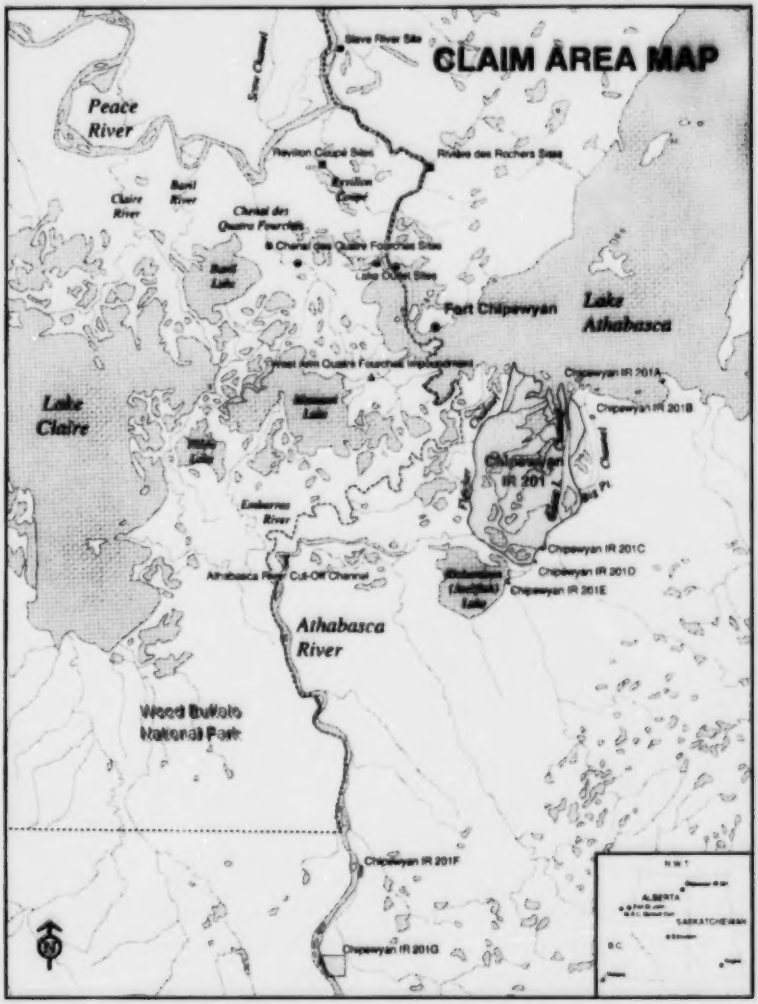
The second river that feeds the delta, the Athabasca River, has its origins in the melting snow and glaciers of the Columbia Icefield, a high plateau in the Rocky Mountains between Mount Columbia and Mount Athabasca on the Continental Divide, which marks the British Columbia–Alberta border. It flows north through Jasper National Park, then northeast across the province of Alberta, and is joined by a number of tributaries. From Fort McMurray, the Athabasca River flows north through the Peace-Athabasca Delta and into Lake Athabasca.

Prior to the construction of the Bennett Dam, the Peace-Athabasca Delta had a rich and diverse ecology of international significance. The hydrology of the delta, coupled with a variety of landforms and lush vegetation, supported a remarkable diversity of birds, mammals, and fish. The delta was one of the earliest areas settled in Alberta. Fort Chipewyan was an important outpost for the Hudson's Bay Company, as the delta was renowned for the quantity and quality of its muskrat pelts. The delta's wetlands and ecology, however, are sensitive and highly dependent on the water levels of the various rivers and tributaries that feed the delta.

The flood regime of the Peace-Athabasca Delta is complex because water flow is determined by four primary drainage systems: the Peace, the Athabasca, the Birch, and the Fond du Lac Rivers. Before the Bennett Dam

17 Northern Rivers Basin Study Board, *Northern Rivers Basin Study: Report to the Ministers, 1996* (Edmonton: Nautilus Publications, 1996), 22 (ICC Exhibit 3) (hereinafter *Northern Rivers Basin Study*).
18 *Northern Rivers Basin Study*, 17, 22 (ICC Exhibit 3).


PEACE-ATHABASCA DELTA
NORTHWEST TERRITORIES
ALBERTA
BRITISH COLUMBIA
ALBERTA
Wood Buffalo
W.A.C. Bennett Dam
Fort St.
Hudson's Hope
Fort Chipewyan
Fort McMurray
ALBERTA
SASKATCHEWAN
Edmonton
Jasper National Park
LEGEND
Athabasca River Basin
Peace River Basin
Slave River Basin
Lake Athabasca Basin


CLAIM AREA MAP
Peace River
Lake Athabasca
Fort Chipewyan
Lake Claire
Athabasca River
Wood Buffalo National Park
Chipewyan IR 201
Chipewyan IR 201A
Chipewyan IR 201B
Chipewyan IR 201C
Chipewyan IR 201D
Chipewyan IR 201E
Chipewyan IR 201F
Chipewyan IR 201G
Embarras River
Athabasca River Cut-Off Channel
Claire River
Revillon Coupé Site
Rivière des Rochers Site
Steve River Site
Lake Claire Site
Lake Colvert Site
Mission Lake
Namur Lake
Rabbitskin Lake
N.W.T.
ALBERTA
SASKATCHEWAN
B.C.

was constructed, water levels largely depended on the amount of water in the four basins and the timing of the water flows during the spring flood and summer high-water periods. Spring flooding in the Peace-Athabasca Delta, which historically occurred every two or three years, contributed to the following natural phenomenon:

> The spring flood stages . . . had the effect of slowing the normal, long-term deltaic development, and held much of the area at an early successional stage . . . the frequent disturbances of the delta vegetation by flooding resulted in a diverse vegetation mosaic of extremely high value to wildlife.[19]

The Peace River played the most crucial role before the Bennett Dam was built, serving as a natural hydraulic dam at the northern edge of the delta, and determining the flow of water north from Lake Athabasca and the Peace-Athabasca Delta into the Slave River system.[20] John Macoun, a botanist with the Geological Survey of Canada, described the water patterns of the delta in 1875:

> Quatre Fourches discharges part of the waters of Lake Athabasca into the Peace when the latter river is low in the fall, but in the spring the current is reversed, and the waters of the Peace pass by it into the lake. The whole country around the South and West sides of Lake Athabasca is a vast alluvial plain, elevated but a very few feet above the level of the lake, and some years much of it remains permanently flooded.[21]

The 1996 *Northern Rivers Basin Study* also concluded that the flow of water in the Peace-Athabasca Delta is fundamental to its unique environmental features. When flooding of the Peace River results in water levels higher than that of Lake Athabasca, water flows south into Lake Athabasca and the Peace-Athabasca Delta. The flow reversal or "backflooding" in the Chenal des Quatre Fourches, Revillon Coupé, and Rivière des Rochers caused by high Peace River water levels played an integral role in maintaining the wetlands and "perched basins" of the Peace-Athabasca Delta and IR 201. The "perched basins" consist of a number of small lakes that were replenished only through periodic overland flooding caused by spring ice jams on the

19 Jeffrey E. Green, "A Preliminary Assessment of the Effects of the W.A.C. Bennett Dam on the Athabasca River Delta and the Athabasca Chipewyan Band," Vancouver: The Delta Environmental Management Group Ltd., 1992, pp. 21-22 (ICC Exhibit 2A, tab 7, ICC pp. 466-67) (hereinafter cited as Green, "Preliminary Assessment").

20 Green, "Preliminary Assessment," pp. 6-7 (ICC Exhibit 2A, tab 7, ICC pp. 451-52).

21 As quoted in W.A. Fuller and G.H. La Roi, *Historical Review of Biological Resources of the Peace-Athabasca Delta* (Edmonton: University of Alberta, Water Resources Centre, 1971), 157 (ICC Exhibit 2A, tab 9, ICC p. 555) (hereinafter cited as Fuller and La Roi, *Historical Review of Biological Resources*).

Peace River.[22] The effect of the Bennett Dam on the perched basins and other features of the delta will be discussed later in this report.

**The Chipewyan People and the Peace-Athabasca Delta**

The earliest written accounts to mention the Chipewyan indicate that they inhabited a large area of the barren lands and transitional forests between Hudson Bay and Great Slave Lake. The traditional land areas used by the Athabasca Chipewyan First Nation encompassed the southern shores of Lake Athabasca in Saskatchewan and Alberta and the drainage basin of the Athabasca River in the area of the Athabasca Delta.[23]

The Chipewyan gradually adapted their culture to the fur trade and pushed into Athabasca country as trading posts opened in the interior in the late 18th century. By the early 1800s, the Chipewyan were well established around Lake Athabasca and were expanding up the Peace and Athabasca Rivers.[24] The fur trade at Lake Athabasca began in earnest in 1788, when Roderick Mackenzie established a post on Old Fort Point for the North West Company. Some time before 1802, the North West Company moved its post to the north shore of Lake Athabasca near the modern site of Fort Chipewyan. The Hudson's Bay Company and the XY Company[25] also established posts in the area between 1791 and 1814. In 1821, the Hudson's Bay Company and the North West Company amalgamated, and Fort Chipewyan became the headquarters for the trade in the Athabasca District.[26]

Trading posts were typically established on pre-existing native trade routes and in areas where game and fish were plentiful. Renowned Canadian historian Olive Dickason stated that the bountiful resources of this area accounted for the decision of early European traders to locate Fort Chipewyan in the heart of the delta.[27] Fort Chipewyan was strategically placed, giving traders access to extensive river systems of the north and opening up trade to the west through the mountains. Fort Chipewyan would shortly become the North

22 *Northern Rivers Basin Study*, 22-23 (ICC Exhibit 3).
23 Green, "Preliminary Assessment," p. 1 (ICC Exhibit 2A, tab 7).
24 J. Pollock, "Early Cultures of the Clearwater River Area," Alberta Culture, Historical Resources Division, Archaeological Survey of Alberta, *Occasional Paper #6* (1978), 13-14.
25 XY Company, also known as the New North West Co., used this name to distinguish its goods from those of the North West Company. It merged with the North West Company in about 1804: *The Canadian Encyclopedia*, 2d ed. (Edmonton: Hurtig, 1988).
26 G.H. Blanchet, "Emporium of the North," *The Beaver*, Outfit 276 (March 1946), 33-34.
27 Olive P. Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992), 202.

West Company's most important trading post in the north, accounting for a large proportion of its total business in fur.[28]

Alexander Mackenzie, who wintered near Lake Athabasca in 1787, wrote of a great bounty of furs and fish, and "during a short period of the spring and fall, great numbers of wild fowl frequent this country, which prove a very gratifying food after such long privation of flesh meat."[29] The traders living at the fort easily harvested the plentiful game and, in particular, the rich local fish stocks to sustain themselves when not trapping.

The Chipewyan and Cree in the area also flourished in the delta. John Macoun, who travelled down the Peace River by canoe in 1875, wrote that the people living in the delta region were primarily flesh eaters who were not predisposed to agricultural pursuits, but the abundant game and fish in the delta were regularly harvested by the Chipewyan people.[30]

In 1899, Canada dispatched a party to the north for the purpose of concluding Treaty 8 with the various bands. One of the members of that party, Roderick MacFarlane, a former Chief Factor for the Hudson's Bay Company, described their encounters with the wildlife of the delta region. As he and the others crossed Lake Athabasca's western limits from Fort Chipewyan, the party found themselves "skirting the most extensive marshes and feeding grounds for game in all Canada; the delta is renowned throughout the north for its abundance of waterfowl, far surpassing the St. Clair flats, or other regions in the east."[31]

In 1893, an American zoologist from the State University of Iowa, Frank Russel, spent five weeks collecting various samples of waterfowl at Fort Chipewyan. He provided one of the most accurate descriptions (from a scientific perspective) of the Peace-Athabasca Delta to that date:

> The Athabasca and Peace River are both fed by the melting of mountain snow and both carry an immense quantity of mud and driftwood into their deltas, which have been extended several miles from the hills that mark the original boundaries of the lake . . . These channels swarm with muskrats and in the migratory season myriads of waterfowl halt upon the battures[32] to feed, while a comparatively small number

28 Olive P. Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992), 202-04.

29 As quoted in Fuller and La Roi, *Historical Review of Biological Resources*, 153 (ICC Exhibit 2A, tab 9, ICC p. 553).

30 Fuller and La Roi, *Historical Review of Biological Resources*, 157 (ICC Exhibit 2A, tab 9, ICC p. 555).

31 Fuller and La Roi, *Historical Review of Biological Resources*, 157 (ICC Exhibit 2A, tab 9, ICC p. 557).

32 "Battures" is defined as "a shoal or rocky shore, usually exposed at low water," "an expanse of river beach," or "a sand bar, especially one that forms a small island when the water is low," in *A Dictionary of Canadianisms* (Toronto: Gage, 1967).

remain during the summer to breed in the adjoining marshes. More geese and ducks are killed there than at all other posts in the north. The big and little waveys (snow geese) are the most abundant and the most highly prized though swans and Canada geese, ducks and cranes abound.[33]

In the 20th century, there have been numerous surveys of the extensive biological networks of the Peace-Athabasca Delta. The delta was regarded as possessing one of the most diverse concentrations of biological species in North America. The complex hydrology of the delta was also frequently remarked upon by the visitors to the basin region early in this century.

**Treaty 8**

On June 21, 1899, Treaty 8 was signed at Lesser Slave Lake. Its written terms state that the "Cree, Beaver, Chipewyan and other Indians" inhabiting the area ceded to Canada approximately 324,900 square miles of land in northern Alberta, northeastern British Columbia, northwestern Saskatchewan, and southern North-West Territories.[34] Because the area was so vast, it was impossible to have all interested Indians represented at the Lesser Slave Lake negotiations, and so, in the months that followed, the Treaty Commissioners travelled to different locations in the ceded area to negotiate with other bands. By 1914, some 32 bands had adhered to the terms of Treaty 8.[35] On July 13, 1899, Treaty Commissioners J.A.J. McKenna and J.H. Ross met with two bands – one Cree and one Chipewyan – at Fort Chipewyan on Lake Athabasca. Chief Alexandre Laviolette and headmen Julien Ratfat and S. Heezell signed the adhesion to Treaty 8 on behalf of the Chipewyan Band.[36]

In the 1880s, railway construction and public works projects expanded northward in Alberta. As a result, the Hudson's Bay Company and the Indians to the north of the Treaty 6 area petitioned for a treaty. The Crown initially declined to enter into treaty in this area, but with the discovery of gold in the Yukon in 1896, interest in the treaty-making process was renewed. The Yukon gold rush caused a large number of non-Indians to pass through what is now northern Alberta and Saskatchewan. An Order in Council dated June 27, 1898, gave federal Treaty Commissioners discretion to decide what terri-

33 Fuller and La Roi, *Historical Review of Biological Resources*, 157-58 (ICC Exhibit 2A, tab 9, ICC pp. 556-57).

34 *Treaty No. 8, Made June, 1899 and Adhesions, Reports, Etc.* (Ottawa: Queen's Printer, 1966), 12 (hereinafter *Treaty No. 8*).

35 Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: DIAND, 1986), 109.

36 *Treaty No. 8*, 16-17. It should be noted that, although the Cree Band and the Chipewyan Band were two distinct bands, they operated under one administration referred to as the Athabasca Cree Chipewyan Band until 1978: see testimony of Lawrence Courtoreille in ICC Transcripts, November 27, 1996, pp. 127-28, 161.

tory would be included within the treaty area. Treaty Commissioner Laird explained how boundaries of the Treaty 8 area were determined:

> The scope of the Commissioners' instructions was to obtain the relinquishment of the Indian and Halfbreed title in that tract of territory north of Treaty 6 to which Governmental authority had to some extent been extended by sending Northwest Mounted Police there to protect and control whites who were going into the country as traders, travellers to the Klondike, explorers, and miners. The territory, watered by the Lesser Slave Lake, the Peace and Athabasca Rivers, the Athabasca Lake, the South of Great Slave Lake and their tributaries, was where these whites were finding their way, and the Commissioners did not deem it necessary to extend Treaty 8 farther than they did.[37]

In February 1899, Commissioner Laird issued instructions to the government's field representatives to clarify the "misleading reports . . . being circulated among the Indians" of the area and to assure them that their right to hunt, fish, and trap would be protected under the proposed treaty:

> You may explain to them that the Queen or Great Mother while promising by her Commissioners to give them Reserves, which they can call their own, and upon which white men will not be allowed to settle without payment and the consent of the Indians before a Government officer, yet the Indians will be allowed to hunt and fish over all the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season; and also as long as the Indians do not molest or interfere with settlers, miners or travellers.[38]

The written terms of Treaty 8 provided for annuities, education, agricultural assistance, and "reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves." The Indians were also promised that they would have "the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . subject to such regulations as may from time to time be made by the Government . . ."[39]

With respect to the establishment of reserves, the Indians told the Treaty Commissioners that they were primarily concerned with protecting and con-

37 René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 60, quoted in ICC, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations* (Ottawa, December 1995), reprinted (1995) 3 ICCP 27.

38 Commissioner D. Laird to "Sir," February 3, 1899, National Archives of Canada (hereinafter NA), RG 10, vol. 3848, file 75236-1, quoted in ICC, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations* (Ottawa, December 1995), reprinted (1995) 3 ICCP 28.

39 *Treaty No. 8*, 12.

tinuing in their traditional hunting, fishing, and trapping economy. This is confirmed by the following excerpts from the Commissioners' Report for Treaty 8:

> There was expressed at every point the fear that making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .
>
> We pointed out . . . that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. . . . *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of Indians and were found necessary in order to protect the fish and fur bearing animals would be made, and they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*[40]

The Treaty 8 Commissioners were aware that the northern people's traditional way of life based on hunting, fishing, and trapping would continue to provide them with a viable means of making a living. It is for this reason that the Indians did not want to be limited to reserves and, for the most part, did not want to take up farming. At Fort Chipewyan, a Catholic missionary recorded this discussion between the Indians and Treaty Commissioners in his diary:

> The Commissioner explained the Government's views and the advantages it offered to the people. The Chief of the Crees spoke up and expressed the conditions on which he would accept the Government's proposals:
>
> 1. Complete freedom to fish.
> 2. Complete freedom to hunt.
> 3. Complete freedom to trap.
> 4. As himself and his people are Catholics, he wants their children to be educated in Catholic schools.
>
> In his turn, the Chipewyan spokesman set the same conditions as the first speaker. The Commissioner acknowledged all the requests which both had voiced.[41]

Father Gabriel Breynat also witnessed the treaty at Fort Chipewyan and later wrote:

40 *Treaty No. 8*, 6. Emphasis added.
41 Quoted in René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 77.

> Discussions were long enough but sincere; Crees and Chipewyans refused to be treated like Prairie Indians, and to be parked on reserves. . . . It was essential to them to retain complete freedom to move around.[42]

At the conclusion of the Treaty 8 negotiations, the Commissioners reported to the Superintendent General of Indian Affairs that the selection and survey of reserves could wait until some future date, when they were required to protect a band's land base:

> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of land ceded, in the event of settlement advancing.[43]

## Selection and Survey of Athabasca Chipewyan Indian Reserves

In the period immediately following the treaty, the Chipewyan Band of Fort Chipewyan continued to follow its traditional pursuits in relative prosperity with minimal interference from government officials and non-Indians. The Department of Indian Affairs did not establish an agency in the area until 1911, and contact with federal officials was limited to the annual treaty annuity payments. Reports of these visits were typically short and without detail, but they do provide some information about the livelihood and well-being of the band. In 1903, for example, the Treaty 8 Inspector, H.A. Conroy, reported on his stop at Fort Chipewyan:

> We paid the annuities of the Chipewyans and Crees. These Indians also had been very successful in their hunts, as they had sold large quantities of furs to the Hudson's Bay Company and traders. They had no sickness nor epidemics. Fish was very plentiful and they were very prosperous, fur bringing good prices.[44]

42 Quoted in René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 78.
43 *Treaty No. 8*, 7.
44 Report from Inspector for Treaty No. 8, October 5, 1903, in Canada, Parliament, *Sessional Papers*, 1904, "Annual Report of the Department of Indian Affairs for the Year Ending June 30, 1903," 234-36.

By 1918, railways had been built to Peace River Crossing and Fort McMurray, and steamers were operating on the Peace and Athabasca Rivers, both of which provided non-Indian and Métis trappers from the south with easy access to the abundant fur supply in the Fort Chipewyan area. The influx of trappers into the area soon began to cause a decline in fur harvests, and by the early 1920s, the Indians of northern Alberta were asking the Department of Indian Affairs for protection of their way of life.

At the treaty payments at Fort Chipewyan in 1922, the Cree Band and "some 50 members of the Chipewyan Band, living at the mouth of Birch River," complained to the Agent about the "outsiders," and the Agent recommended that approximately 4000 square miles be set aside as a hunting preserve for the exclusive use of these Indians:

> [I]n my opinion, the only effective way to protect their interests would be to apply for a hunting and trapping Reserve in that district in which they have their homes and have always lived. I have outlined on the attached map the district which they desire reserved. . . . [T]he district is much larger than the amount of land guaranteed by treaty. But, as the greater part of the district is swamp and marsh ground, not suitable for farming or grazing, it would appear to me, that it might justly, viewed from the Indian standpoint, be set aside as a trapping reserve, and set aside for them, as from time immemorial, they have used it for this purpose. The Indians have no other way of making a living, constituted as they are, than by hunting and trapping.[45]

Chief Laviolette and other members of the Band made their first formal request for this land as early as 1922. The area requested was much larger than what they would later receive, but the Peace-Athabasca Delta was definitely the desired location, and they emphasized the fact that they needed the land to continue their traditional vocations:

> I have consulted the matter with my own people and the Cree Band. We are now asking for as hunting reservation, according to the size of the population of the two tribes, at the present time, viz. From the old Fort on the Athabasca River to Jack Fish Creek on the Peace River, down to the Junction of the Peace and Athabasca River, from there to Big Bay on the north shore of Athabasca Lake and across the Lake to the south shore, and up to the boundary and back to Old Fort.
>
> The above mentioned will give us the sufficient ground for hunting, trapping and fishing we want big enough hunting reserve for all of us to make a living on, in hunting, trapping and fishing.

45 J. Card, Indian Agent, Fort Smith, NWT, to [Department of Indian Affairs, Ottawa], July 5, 1922, NA, RG 10, vol. 7778, file 27134-1.





> We can not go in for farming as we know farming will never be a success down here.
>
> We are all signing this to show that we are all ask for the above reserve. There are lots of white men who are trapping during the closed season, we want them stopped.[46]

In the years that followed, while federal authorities negotiated with the provincial government for larger hunting preserves, the Cree and Chipewyan Bands at Fort Chipewyan actively campaigned for a survey of its reserve. In 1923, a delegation of the bands travelled at their own expense to Edmonton, where they met with the Minister of the Interior to press their case.[47] The matter was also discussed with government officials during the annual treaty payments.

By 1926, the competition for fur resources in the area became critical. In that year, the boundaries of neighbouring Wood Buffalo Park were extended to include much of the Peace Delta, Lake Claire, Lake Mamawi, and areas as far west as the Athabaska and Embarrass Rivers. Non-Indian trappers who were excluded from the park moved into the Jackfish Lake area where the Indians traditionally trapped. The situation became so tense that, in the summer of 1926, the Indians retaliated against non-Indian encroachment by setting forest fires in the hunting grounds.[48]

In February 1927, Chipewyan Chief Jonas Laviolette wrote a long letter to "The Chief of the Indian Department" in Ottawa. His frustration is evident as he described the problems created by the non-Indian trappers in the area and the absolute necessity of a reserve:

> I hope you will not mind me writing this letter to you but I have been waiting so long to hear from you that I think you have forgotten all about me and my people from Fort Chipewyan. . . . I told you in Edmonton that the white trappers where [sic] going to spoil my country and what I said then has come true. My country is just about ruined.
>
> The white men they kill fur with poison, they trap in the sand before the snow comes. They break the rat house and they break the beaver house and now there is hardly anything left and if you don't do something for us we are going to starve . . .
>
> For a long time now I have been begging for a Reserve for me and my people at Jackfish Lake and we still want this very badly. I hope you won't mind me writing this

46 Jonas Laviolette, Chief, and others, Fort Chipewyan, to Indian Agent, Fort Smith, July 1, 1922, NA, RG 10, vol. 7778, file 27134-1.

47 Card to D.C. Scott, May 22, 1924, NA, RG 10, vol. 6732, file 420-2B.

48 D.C. Scott to G. Hoadley, Minister of Agriculture for the Province of Alberta, July 17, 1926, NA, RG 10, vol. 6732, file 420-2B.

to you but it is no good sending this letter to Mr. Card he does not seem to try to help us. Why doesn't he come down here and try and stop these trappers doing wrong to us. No one seems to care what happens to us. There are lots of men here looking after Buffalo, no one looking after us. We only see Mr. Card once a year and then only for a few hours. . . .

The white trapper comes here and kills all here then moves to another country. We cannot move and we don't want to because our fathers father's used to live here and want our children to live here when we die. Jackfish Lake use to be fine rat country but they don't get a change to breed up because there are more trappers than rat. If you will give us this country for a Reserve and someone to help us look after it will save me and my people from starvation. Thirty years ago it was a fine country because just the Indians lived in it. . . .

From Jackfish Lake it is not far to the Buffalo Park and we like our Reserve to join to that line. And from Jackfish Lake we would like it to go to the big lake because there we can catch the fish. We are afraid to ask for too much hunting land for our Reserve because you may not give us what we want, but we want to have some land to call our own, where we can hunt and fish and grow a little potatoes. If we get this Reserve, the white trappers and the half breeds cannot bother us . . .[49]

At one of the Commission's community sessions, Mrs Victorine Mercredi told the Commission:

In 1928 Chief Jonas Laviolette requested for a piece of land which is known [as] Reserve 201 today for the Band members only because there were a lot of people coming in and people were starting to mix up and it was creating a problem for everybody. So he requested the land, the delta just for trapping for the people.[50]

Despite Chief Laviolette's entreaties, federal authorities took no action to set aside reserve land until 1931, when increased mineral exploration in the area threatened the most desirable locations already selected by the Indians as reserves. In the summer of 1931, H.W. Fairchild, a surveys engineer employed by the Department of Indian Affairs, was instructed to meet with the Indians to define reserve locations "in accordance with the terms of Treaty No. 8 and according to their population at this year's Treaty payment."[51] Fairchild met the Chief and various band members after treaty annuities were paid in July 1931 and determined that Indian houses, gardens, cemeteries, and fishing grounds were located at various sites, including five

49 Jonas Laviolette, Chief of Fort Chipewyan Indians, to Chief of the Indian Department, Ottawa, February 20, 1927, NA, RG 10, vol. 6732, file 420-2B.

50 ICC Transcript, November 27, 1996, p. 135 (Victorine Mercredi).

51 A.F. MacKenzie, Secretary, Department of Indian Affairs, to H.W. Fairchild, Surveys Engineer, Caughnawaga, PQ, June 9, 1931, NA, RG 10, vol. 7778, file 27134-1.

small areas on the south shore of Lake Athabasca and on the eastern edge of the delta, and another two sites up the Athabasca River at Point Brule and Poplar Point. Seven small reserves, identified as Indian Reserves 201A to 201G, were surveyed that summer. The reserves ranged in size from 10.7 acres to 2237 acres, for a total of 4.4 square miles of land.[52]

Establishing the boundaries of IR 201, the main reserve in the delta, was not as straightforward. Before Fairchild and the survey party had left Edmonton, they had approached Alberta government officials for permission to deviate from the standard practices by, first, granting acreage in excess of the treaty provisions because of the marshy nature of the land and, second, by accepting natural water boundaries, which could be identified from aerial surveys. Alberta officials deferred their response to this request, and the survey party in the field in the summer of 1931 traversed only the eastern boundary of the proposed reserve. It was not until 1935 that federal and provincial governments finally agreed on certain natural boundaries and an area somewhat larger than the 68 square miles required by treaty.[53] According to the survey plan, the area set aside for the Chipewyan Band was 77.5 square miles (49,600 acres) "after deducting the water areas."[54] Certificate of title transferring the land from Alberta to Canada was issued on December 23, 1937, and on June 3, 1954, Chipewyan Reserve 201 was officially established as an Indian reserve by Order in Council PC 1954-817.[55]

In his report on the surveys in 1931, Mr Fairchild described the area within the delta as "a hunter's paradise":

> No. 201 which is the main reserve, lies wholly within "The Delta" and is without a doubt the best revenue producing tract in the north country, as it is a natural breeding ground for fur bearing animals and game birds, which afford both revenue and sustenance for this band of Indians. Thousands of muskrat are taken annually from the area between the East channel of the river and Fletcher Channel.[56]

52 See description of reserves in Fairchild's report to the Secretary, Department of Indian Affairs, December 16, 1931, NA, RG 10, vol. 7778, file 27134-1.

53 H.W. McGill, Deputy Superintendent General of Indian Affairs, to John Harvie, Deputy Minister, Department of Lands, Edmonton, June 19, 1935, NA, RG 10, vol. 7778, file 27134-1.

54 Chief Surveyor, Ottawa, to Deputy Superintendent General of Indian Affairs, July 3, 1935, and Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1.

55 DIAND, Reserve General Register, Reserve 06704 Chipewyan No. 201.

56 H.W. Fairchild to Chief Surveyor, November 4, 1931, p. 2, and Fairchild to Secretary, Department of Indian Affairs, December 16, 1931, p. 3, in NA, RG 10, vol. 7778, file 27134-1.

Map 3 on page 143 shows IR 201 and a number of the isolated basins and waterways that made this reserve a prized area for trapping muskrat.[57] Clearly, both the band and the government knew that this rich hunting and trapping resource was the primary reason for selecting land in the delta for a reserve. When applying to Alberta for the lands in 1935, the Deputy Superintendent General specifically requested that the wording of the transfer from the province reflect the Band's use of the land:

> [I]n order that there be no grounds for misunderstanding that it be stated [in the Order in Council that] these Indians are granted exclusive hunting and trapping privileges within the area. . . .
>
> The Department considers it most important that there be no doubt about the exclusive hunting and trapping privileges, as it is for this reason that so much of the area to which these Indians are entitled under the terms of the Treaty No. 8 is being utilized to obtain an area which is of no other commercial value.[58]

At our community sessions, the elders repeatedly told us that IR 201 was chosen because of the bounty of its flora and fauna, particularly muskrat. The current chief, Archie Cyprien, told the Commission:

> One of the main reasons [th]at that particular location was chosen was because of the muskrat population. It was a prime muskrat location for this whole delta area. And the people and the Chief at that time wanted to assure that we had access to that and that we could make a livelihood . . .[59]

Mr Lawrence Courtoreille of the Mikisew Cree First Nation agreed:

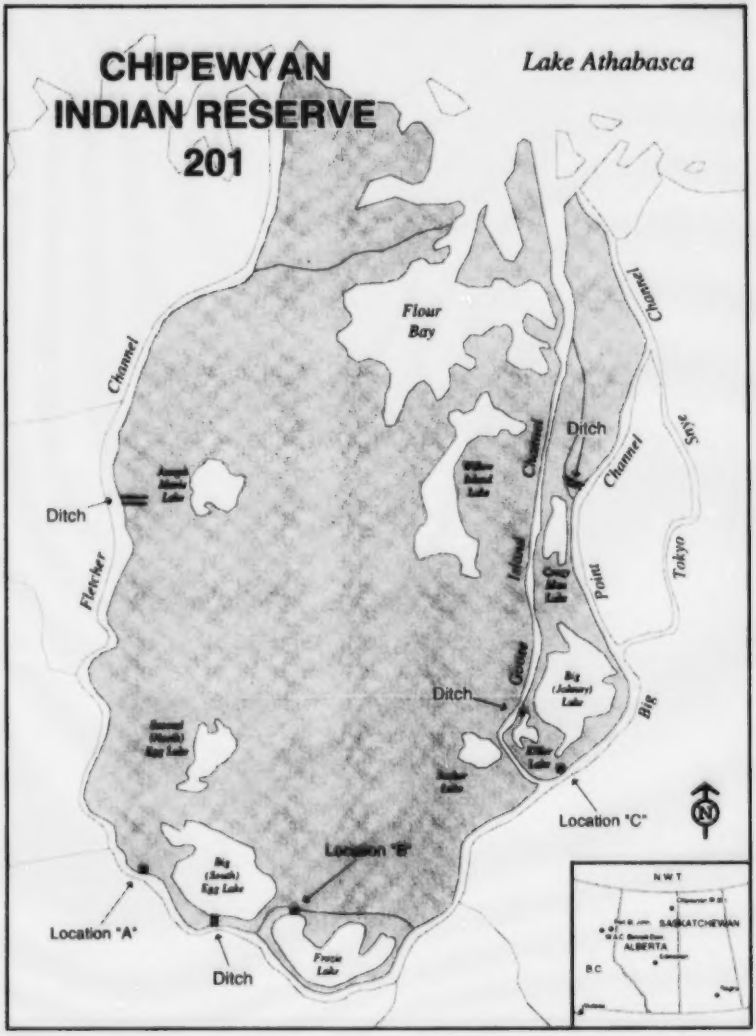
> This was the big area where you could get the best beaver and muskrat. She [Mrs Mercredi] mentioned earlier that there was a lot of struggles between her people and non-Indian people coming into the region because you people coming from the south trying to make it rich through the trapping season.
>
> So in order to accommodate the Chipewyan people, there was negotiations to take a large tract of the Delta, to ensure people continued to benefit from the trapping industry. So as a result, the Chipewyan Reserve #201 was primarily for the economic benefit of trapping and the beaver industry.[60]

57 This map of IR 201, which shows isolated basins, the location of ditches, and major diversions through levee breaches at Locations "A," "B," and "C," is reproduced from Green, "Preliminary Assessment," p. 20 (ICC Exhibit 2A, tab 7).

58 Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1.

59 ICC Transcript, November 27, 1996, p. 170 (Chief Cyprien).

60 ICC Transcript, November 27, 1996, pp. 169-70 (Lawrence Courtoreille).


CHIPEWYAN
INDIAN RESERVE
201
Lake Athabasca
Flour Bay
Channel
Channel
Channel
Snye
Ditch
Ditch
Ditch
Fletcher
Island
Point
Tokyo
Big
Location "A"
Location "B"
Location "C"
Ditch
Frozen Lake
N W T
SASKATCHEWAN
ALBERTA
B C

Seventy-nine-year-old Victorine Mercredi recounted the poignant words of Chief Jonas Laviolette to his people when the reserve was finally set aside for the Band:

> In the '40s when the reserve was formed and again Chief Laviolette met with these people and he told these Band members, he said I got this land for you, for now and for your children in the future for trapping, for hunting, for fishing. Look after the land good and it will look after you.[61]

## Economy and Way of Life on Indian Reserve 201

For generations, the Peace-Athabasca Delta provided a reliable livelihood for the Athabasca Chipewyan, through commercial trapping and by providing food for sustenance. After the fur trade extended into the delta region in the early 18th century, the Chipewyan began to transform their subsistence-based way of life to one closely tied to the trapping of furs for external consumption and commercial profit. Nevertheless, the Chipewyan people also derived most of their sustenance from the delta and its bounty. A 1996 study into the Peace-Athabasca Delta expressed the strong link between the Indians and the delta ecosystem in these terms:

> The intimate connection between these peoples and the land spans generations and provides a source of strength and spirituality. Due to their lifelong experience with the rivers, native elders and other traditional residents embrace a wealth of knowledge regarding the natural cycles of the ecosystem and the changes in the land.[62]

The elders recall the great numbers of muskrat and other animals in the Peace-Athabasca Delta prior to the construction of the Bennett Dam and their reliance on those abundant resources. Elder Victorine Mercredi stated that:

> Reserve 201 was our main source of income for our families, for me and my family. Not only did we trap muskrats but we also trapped fine fur elsewhere. But our main source . . . for trapping and for our livelihood was muskrat on Reserve 201.
>
> Because there were a lot of muskrats for the people to trap, many families relied on Reserve 201 for our livelihood. By trapping muskrats, men had income and security for their family. They were able to buy their supplies, their food, their clothing for their children, as well as their other needs, like out board motors and so forth and whatever we needed, guns. This was all provided mostly by trapping the muskrats on Reserve 201.

61 ICC Transcript, November 27, 1996, p. 135 (Victorine Mercredi).
62 *Northern Rivers Basin Study*, 25 (ICC Exhibit 3).

> Back then Reserve 201 had lots of water. Because they maintained a steady level of water year round there were muskrats all over the delta. Every little pot hole you would find there were muskrats on it. And by that we had a lot of security.
>
> This Reserve 201 and all the muskrat one day started to decline. At that time people were not aware what was causing the declining of the muskrat in the water because nobody came to them to tell them what was happening.[63]

Elder Eliza Flett confirmed that, besides muskrat, her people "trapped for other fur bearing animals on reserve like mink, fox . . . weasles."[64] Elder Daniel Marcel also affirmed that:

> When we have a lot of muskrats, the muskrat also provides food for other fur bearing animals, such as mink, foxes, coyote and even mink. Now, there is almost hardly anything of other fur animals on the reserve. Mink that I used to catch on the delta were big, large in size. In the last few years that I trapped a few mink that I caught were very small and didn't bring any price and no nothing. We used to live by killing muskrats. Now, I don't know how those animals survive out there.[65]

The great reliance the Athabasca Chipewyan people put in the resources of the reserve is obvious from the following quotation from elder Victorine Mercredi: "To trap muskrat was like going to the bank. It was like having money in the bank because it was that simple. . . ."[66]

Mrs Madeline Marcel, who lived in the delta long before the construction of the Bennett Dam, recalled the diversity of game and fish that were once present there, particularly in the area of IR 201:

> I lived on Reserve 201 on Jackfish Lake since 1937. I lived in the area for 50 some odd years. There were many families living on Reserves back then. We had a lot of resources like from trapping muskrats. The delta had a lot of water and we lived well. Life was very simple and very rewarding living on the reserve because we had a lot of wildlife, like muskrats. Not only by trapping people made their living, they also made a living by trapping other animals like moose, they hunted ducks, they fished. Life was very good to us back then.[67]

The periodic flooding of the delta area was intricately linked to the abundance of plant and animal life. It is equally clear that this flooding was crucial to the maintenance and preservation of IR 201:

63 ICC Transcript, October 10, 1996, p. 39 (Victorine Mercredi).
64 ICC Transcript, October 10, 1996, p. 50 (Eliza Flett).
65 ICC Transcript, October 10, 1996, p. 56 (Daniel Marcel).
66 ICC Transcript, November 27, 1996, p. 39 (Victorine Mercredi).
67 ICC Transcript, October 10, 1996, p. 33 (Madeline Marcel).

> The extensive flooding of the Delta recharged lakes and perched basin wetlands throughout the delta, deposited silt and plant seeds, provided nutrients and flushed out decomposed plant materials . . . Annual spring flooding and sedimentation also disrupted plant succession, producing a dynamic and highly productive mosaic of aquatic and terrestrial habitats. This delta ecosystem which was created by these natural conditions was estimated to support at least 250 species of plants, 250 species of birds, 45 species of mammals, and 20 species of fish . . .
>
> For the Chipewyan peoples, the Athabasca delta has for millennia been an integral force in the bond between land and people, culture and spirituality. The delta ecosystem has provided a diverse range of animal and plant foods, medicinal herbs, products for clothing and building, a reliable source of clean water, and other of life's essentials. The network of rivers, creeks, lakes and marshes also provided a natural transportation network allowing native peoples to travel, hunt, fish and trap.[68]

Well into the 1930s, the Department of Indian Affairs' Annual Reports consistently state that the Indians in the north, including the Fort Chipewyan Band, made their living primarily by hunting, fishing, and trapping. These reports were more detailed than they were after World War I, and in 1909 and 1910 the Treaty 8 Inspector estimated that the two bands at Fort Chipewyan caught at least 50,000 muskrat in the spring of 1909 and over 80,000 the following year.[69] From 1947 to 1949, W.A. Fuller studied the muskrat harvest in the delta and made these observations:

> At that time the population was recovering from a low in 1944–46 that coincided with low water levels . . . The muskrat harvest of the Wood Buffalo Park portion of the Delta was conservatively estimated at 40,000–45,000 animals with wide cyclic variation. About 70% of the trappers' income from fur came from muskrats.[70]

In 1967, a survey conducted by Alberta NewStar revealed that 69.3 per cent of family heads in Fort Chipewyan listed trapping or fishing as an occupation.[71] The Deputy Minister of Indian Affairs in 1970 reported that, before the completion of the dam,

> Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and on Lake

68 Green, "Preliminary Assessment," p. 3 (ICC Exhibit 2A, tab 7).

69 H.A. Conroy, Inspector, Treaty No. 8, to Frank Pedley, Deputy Superintendent General of Indian Affairs, December 30, 1909, Department of Indian Affairs, *Annual Report*, 1909-10, 187, and Conroy to Pedley, November 14, 1910, Department of Indian Affairs, *Annual Report*, 1910-11, 189.

70 Fuller and La Roi, *Historical Review of Biological Resources* (ICC Exhibit 2A, tab 9, ICC pp. 558-59).

71 Stuart Adams & Associates, "A Changing Way of Life," draft dated January 15, 1996, p. 98 (ICC Exhibit 18) (hereinafter Adams, "Changing Way of Life").

> Athabasca, not to mention the commercial fishing activity. Also there has been a very serious loss of country food resources for these people to which no dollar value can be assigned.[72]

Despite the diversity of animal life in the Peace-Athabasca Delta, the Chipewyan people relied heavily on the muskrat which thrived in the wetlands of the delta. It was a source of fur income in its own right, but it was also a food source to fur-bearing animals, such as mink, fox, and coyote.[73] Periodically there have been short episodes of drought that adversely affected the water levels in the delta and, hence, the muskrat population.[74] However, the evidence before the Commission – whether that evidence is in the form of elders' testimony, historical documents, or expert reports – consistently speaks to the undeniable social and economic benefits the Chipewyan people received through the use of IR 201 for hunting, fishing, and trapping. From all accounts, both written and oral, the delta once provided a good living for the Chipewyan people.

## PEACE-ATHABASCA DELTA AFTER THE BENNETT DAM

### Construction and Operation of the Bennett Dam

In 1957, Premier W.A.C. Bennett and the British Columbia government initiated plans to develop a large-scale hydroelectric project to harness the immense power-generating potential of the Peace River. In that year, British Columbia entered into an agreement with a Swedish-owned company to survey potential sites for construction of a dam.[75] By 1959, a report to the government estimated that the project would cost approximately $600 million and had the potential to generate up to 4.2 million horsepower for delivery to Vancouver at the going rate of 6 mills (a mill is one-tenth of a cent) per kilowatt hour.[76]

It is clear from the outset of this enormous project that the regulation of the Peace River could potentially have serious adverse effects. A thesis written by Dr Patricia McCormack on the project suggests that, although government

72 H.D. Robinson, Deputy Minister of Indian Affairs, to J. Austin, Deputy Minister of Energy, Mines & Resources, July 20, 1970 (ICC Exhibit 1B, p. 279).

73 ICC Transcript, October 10, 1996, p. 35 (Madeline Marcel).

74 Adams, "Changing Way of Life," p. 52 (ICC Exhibit 18, tab 3). It should also be noted that the Commission did not have before it all relevant information or documentation in relation to the details of the plan to construct the dam, which provincial departments and agencies were involved in the planning and development of, and by what authority private firms and companies became involved in the project.

75 Adams, "Changing Way of Life," pp. 6-9 (ICC Exhibit 18, tab 1).

76 Earl K. Pollon and Shirlee Smith Matheson, *This Was Our Valley* (Calgary: Detselig Enterprises Ltd, 1989), 193.

officials were aware of potential problems, nothing was done to address these concerns in the planning and construction of the dam:

> B.C. had chosen to dam a river of considerable importance to down-river environments and users. The 1957 report to the B.C. cabinet had suggested that the consequent regulation of the river would benefit both Alberta and the NWT . . . However, . . . B.C. was aware of potential negative impacts of the project but chose to ignore them . . . As Edwin Black concluded form [sic] his analysis of decision-making in B.C., there were few safeguards ". . . against tyranny and irresponsibility" in provincial decision-making. . . .[77]

In July 1959, a meeting took place between the Alberta government and the Peace River Development Corporation Ltd to discuss concerns related to the effect of the proposed dam on water levels at the town of Peace River, Alberta, and fish spawning in Lake Athabasca. At issue were the ecological consequences of reducing peak flow levels during the spring and increasing the average daily flows during the winter months. By way of comparison, prior to construction of the dam the maximum water flow recorded on the Peace River at Hudson's Hope was 267,000 cubic feet per second (cfs) during the month of June 1952, whereas the minimum recorded flow was 3480 cfs in the month of November in the same year. After construction of the dam, it was expected that the long-term average yearly flow would be approximately 36,000 cfs, with the flow during the winter months from November to April being only about 15 per cent of the total flow (i.e., 5400 cfs).[78] To alleviate the downstream effects of reducing the water flow, the company and the Alberta government entered into a preliminary agreement stipulating that a minimum of 6000 cfs of water would be allowed to flow across the BC-Alberta border during construction of the dam and while the water reservoir at Williston Lake was being filled.[79]

In 1961, the BC government assumed control of the project when it appropriated the Peace River Power Development Corporation and BC Electric Company and amalgamated the companies to establish the BC Hydro and

77 Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, p. 490). Original citations removed.

78 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River: Interim Report No. 1," June 1962, p. 9 (ICC Exhibit 1A, tab 3).

79 Barry Craig, "Peace River Delta May Be Dying Because of Alberta's Indifference," *Edmonton Journal*, September 9, 1970 (ICC Exhibit 2A, p. 576). Although the minutes of this meeting and the preliminary agreement are referred to in the article, copies of the original documents were not furnished to the Commission for its review (hereinafter cited as Craig, "Peace River Delta").

Power Authority (BC Hydro) as a Crown corporation through the enactment of provincial legislation.[80] Construction of the W.A.C. Bennett Dam, located 965 kilometers west of Athabasca Chipewyan IR 201, near Hudson's Hope, BC, began in April 1962.

It is important to bear in mind that the Bennett Dam project was undertaken before the institution of mandatory environmental assessment procedures, which are currently in place to ensure that such projects comply with certain safeguards and minimum standards. In this case, before provincial licences were granted to proceed with the dam, the BC Department of Lands, Forests, and Water Resources conducted hearings into the project, later described as "inadequate to today's standards and . . . a mere formality."[81] Although it is not clear under what authority construction of the proposed dam proceeded, the BC Comptroller of Water Rights held public hearings into the project on August 2 and October 15, 1962, in Chetwynd and Victoria, BC.[82] The record suggests that a representative of the federal Department of Indian Affairs attended the hearings to make representations on behalf of the Ingenika Band in British Columbia, whose reserve would be flooded by the dam, but "no one, at either hearing, spoke of potential impacts downstream in Alberta"; "[n]or did any Canadian government representatives attempt to intervene on behalf of the Chipewyan and Cree people."[83]

Following the hearings, BC Hydro was granted a licence from the Comptroller of Water Rights on December 21, 1962, which provided for minimum flow levels to be released from the dam as follows:

| | |
|---|---|
| • Dec. 1 to March 31 | Calculated natural inflows to the reservoir |
| • April 1 to July 15 | 10,000 cfs or the natural flow, whichever is the lesser, as measured near Taylor |
| • July 16 to Sept. 15 | 10,000 cfs, as measured near Hudson Hope |
| • Sept. 16 to Nov. 30 | 10,000 cfs or the natural flow, whichever is the lesser, as measured near Taylor. |

80 See Adams, "Changing Way of Life," p. 9 (ICC Exhibit 18, tab 1), and *An Act to Establish the British Columbia Hydro and Power Authority*.

81 Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, p. 489).

82 Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, p. 576). What representations, if any, were made by federal officials in these hearings cannot be ascertained because the historical record is incomplete.

83 Adams, "Changing Way of Life," pp. 9-10 (ICC Exhibit 18, tab 1).

- Provided also that a flow of not less that 1000 cfs shall be released from the dam at all times.[84]

Although representatives of the Alberta government did not attend the public hearings, they had been invited in 1959 by BC Minister of Lands and Forests, Roy Williston, to ensure that "the needs of the Peace River in Alberta . . . would be presented at the time of the hearing by responsible authorities."[85] It may be that the Alberta government chose not to attend the hearings because it had already entered into a preliminary agreement in 1959 to ensure a minimum flow level of 6000 cfs at the Alberta border. In any event, when Alberta learned about the licence granted to BC Hydro requiring only a minimum flow of 1000 cfs, it sought assurances from the BC government that it would not deviate from the understanding set out in the 1959 agreement. In a letter dated March 26, 1963, BC Minister Williston dismissed the concerns of Alberta Minister of Agriculture Harry Strom, later Premier of Alberta, regarding the status of the agreement:

> With respect to your remarks concerning promises by the Peace River Power Development Company, it is first recorded that this government was not associated with these presentations [sic] and does not feel bound by the pronouncement of its officials.[86]

Construction of the 600-foot-high dam was completed in December 1967, the last diversion tunnel was closed off, and BC Hydro began to regulate the downstream flow of water on the Peace River to fill the Williston Lake reservoir. With the capacity to hold a total volume of 47 million acre-feet of water, Williston Lake then ranked as the eighth largest man-made reservoir in the world.[87] Although it took until 1971 for natural run-off to fill the reservoir completely, the generator units at the dam began producing hydroelectric power by 1968.[88]

84 Department of Energy, Mines, and Resources, Inland Waters Branch, "The Effects of Bennett Dam on Downstream Levels and Flows," June 1969 (ICC Exhibit 1B, tab 13, ICC p. 411). Refers to Conditional Water Licence No. 27732 issued by the Province of British Columbia on December 21, 1962.

85 Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, ICC p. 576).

86 Craig, "Peace River Delta" (ICC Exhibit 2A, tab 9, ICC p. 576).

87 Adams, "Changing Way of Life," pp. 6-11 (ICC Exhibit 1B, tab 1), and J. Austin, Memorandum to Minister of Energy, Mines, and Resources, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 275).

88 J. Austin, Memorandum to the Minister of Energy, Mines, and Resources, July 17, 1970 (ICC Documents, p. 275).

W.A.C. Bennett Dam

**Government of Canada's Involvement in the Bennett Dam Project**

As early as 1959, the federal government was aware of the dam and its potential impacts downstream. The first indication of the federal Crown's awareness of potential problems with the construction and operation of the dam arises in the context of what impact it might have on navigation throughout the Peace-Athabasca Delta. On December 16, 1959, the Department of Northern Affairs and National Resources, Water Resources Branch, produced a preliminary report which "outlined the effects to be expected assuming various methods of filling and operating the reservoir. . . ."[89] Since there was little data available at the time to predict accurately the effects of the dam, the Water Resources Branch conducted a study, resulting in the June 1962 report entitled "The Effect of Regulation of the Peace River: Interim Report No. 1." It states that the dam would "materially affect the regimen of the Peace River and thus the Slave River, Great Slave Lake and the Mackenzie River"; the report went on to say that it was "not obvious without investigation whether the project would be beneficial or detrimental to navigation, but any detrimental effect would probably be most serious during the filling of the reservoir."[90]

It is important to note that the Water Resources Branch was asked to study the potential effects of the dam based on the following flow levels in the reservoir-filling program developed by the Peace River Power Development Company in December 1959:

> There will be no interference with the natural flow of the Peace River until the diversion tunnels are closed and the reservoir commences to fill.
>
> In each year thereafter during the construction period, it is proposed to maintain the following minimum daily average flows at the B.C.-Alberta boundary, except as lesser quantities may be agreed to by the appropriate authorities:
>
> (i) throughout the year, a flow at the rate of 6,000 cfs and subject thereto
>
> (ii) after breakup the natural flow of the river entering the reservoir until the river flow exceeds 20,000 cfs at the boundary
>
> (iii) from this time a flow at the boundary at the rate of 20,000 cfs until the natural flow of the river falls below this figure, and

89 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56). The 1962 study conducted by the federal government refers to a document dated December, 16, 1959, entitled "Preliminary Investigation into the Effect of Regulation of the Peace River on Lake Athabasca and the Slave River."

90 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56).

(iv) thereafter the natural flow of the river entering the reservoir until 30 September, subject in the period 1 September to 15 September inclusive to a flow at the rate of 25,000 cfs at the boundary.[91]

Based on these flow levels, the report estimated that water levels in Lake Athabasca would be reduced by 2.5 feet in low water years and 3.5 feet in a high water year, but concluded that "[n]avigation should not be adversely affected once the storage reservoir at Hudson Hope is filled and the power plant is in operation, but such a conclusion would have to be verified when the method of operation becomes known."[92] With regard to the dam's general effect on the delta, the report concluded that:

> The only doubtful area is in Lake Athabasca and the Athabasca River delta, where some dredging is necessary under natural conditions. If the maximum seasonal level of Lake Athabasca were lowered by two or three feet, the water gradients in the delta would be increased. This would undoubtedly cause changes in the delta, but the nature of these changes would be difficult to predict. At the present time it is thought that the delta would move further into the lake, and that it is possible that more dredging might be necessary in the lake in a low water year.[93]

The Commission is wary of placing too much reliance on the conclusions set out in the 1962 report because the licence granted to BC Hydro provided for a minimum flow level of only 1000 cfs at all times. According to a 1969 report by the Inland Water Branch of the federal Department of Energy, Mines, and Resources, the conditions in the licence were modified twice in 1968 to allow a minimum of 1000 cfs from July 16 to September 30, 1968, and a minimum of 10,000 cfs or the natural flow, whichever was less, from the period from December 1, 1968, to March 31, 1969. This 1969 report, however, also addressed navigation downstream from the Peace River and concluded that once the dam was in full operation, and assuming an almost constant release of about 36,000 cfs, "the overall effect may be beneficial because of reductions in flood peaks and increases in low flows."[94] The

91 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 3). Note that the minimum flow level provided for in the reservoir-filling program is consistent with the minimum level agreed to between the Alberta government and the Peace River Development Company.

92 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 58).

93 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962, p. 21 (ICC Exhibit 1A, tab 3, ICC p. 59).

94 Department of Energy, Mines, and Resources, Inland Waters Branch, "The Effect of Bennett Dam on Downstream Levels and Flows," June 1969 (ICC Exhibit 1B, tab 13, ICC p. 415).

report confirmed that the effects on water levels would be most severe during the period in which the reservoir was being filled.

On August 12, 1969, a meeting took place between Ray Williston, BC Minister of Lands, Forests, and Water Resources, and an undisclosed federal minister "to discuss water matters of joint interest." An internal memorandum on the consultative meeting with British Columbia confirms that the federal government proposed a special meeting in the fall of 1969 with officials from the Departments of Indian Affairs and Northern Development and Energy, Mines, and Resources and BC officials "to discuss the Bennett Dam problem," but BC officials were "defensive" and claimed that the long-term regulation of the Peace River would improve flows for downstream navigation.[95] The memorandum does not disclose whether the Department of Indian Affairs made any representations to BC officials on behalf of the Athabasca Chipewyan Band or other aboriginal residents of the area.

When BC Hydro began regulating the flow levels of the Peace River to fill the reservoir in 1968, no formal warning of the flow reduction had been given to downstream residents, and no environmental or social studies were undertaken to determine the effects of the dam.[96] Yet, similar studies completed in relation to earlier dam projects on the Kootenay and Columbia River systems indicated that detrimental environmental impacts on fisheries and wildlife downstream of the reservoirs could be anticipated.[97] These studies relating to the Kootenay and Columbia Rivers prompted concerns in the mid-1960s among professional biologists in the Canadian Wildlife Service and the Alberta Fish and Wildlife Division regarding the Bennett Dam and the potential for harmful effects on the Peace-Athabasca Delta ecosystem as early as the mid-1960s. Accordingly, in 1965-66, the Canadian Wildlife Service requested funding to conduct an environmental assessment of the delta, but the funding was not granted until 1969.[98]

95 A.T. Davidson to Mr McLeod, August 19, 1969 (ICC Exhibit 1B, tab A, ICC p. 265).

96 Michael Harvey, Lyndburst Environment Management, Sherwood Park, Alberta, *Impacts of Hydro Projects on Indian Lands in Western Canada: Indian Strategies*, prepared for Resource Development Impacts Directorate, Indian and Northern Affairs Canada, September 30, 1984 (ICC Exhibit 1B, tab Y, ICC p. 331).

97 For example, see I.L. Withler, "Fisheries Problems Associated with Development of the Peace River and Its Tributaries for Hydro-electric Purpose," B.C. Fish and Wildlife Branch, Fish. Mgmt. Rep. 31, 1959; F.P. Mahler, "A Preliminary Report on the Effects on Fisheries of Four Dams Proposed for the Columbia and Kootenay Rivers in British Columbia," B.C. Fish and Game Branch, Fish. Mgmt. Rep. 34, 1961; G.R. Peterson and I.L. Withler, "Effects on Fish and Game Species of Development of the Duncan Dam for Hydroelectric Purposes," B.C. Fish and Wildlife Branch, Fish. Mgmt. Rep. 8, 1965; I. Smith and S. Harrison, "The Waterfowl and Furbearer Resources of the Libby Reservoir," B.C. Fish and Wildlife Branch Report, 1969, referred to in Green, "Preliminary Assessment" (ICC Exhibit 1A, tab 1, ICC p. 19).

98 Green, "Preliminary Assessment" (ICC Exhibit 1A, tab 1, ICC pp. 19-20).

A 1969-70 preliminary progress report, authored by H.J. Dirschl and released by the Canadian Wildlife Service in March 1970, indicated that the reduced water levels had already had an impact on the water regime, vegetation pattern, and waterfowl use of the delta. The report made the following comments regarding flooding of the delta, the Bennett Dam, and the delta region's economy:

> This extensive delta region is maintained through inundation by silt-laden waters, silt deposition, and water retention in shallow basins. The resurgence and retention of water on the delta depends upon the spring and summer flood levels of the Peace, Athabasca, and Birch rivers. Since the filling of the reservoir behind the Bennett Dam was begun in spring, 1968, flows have remained quite low. *Although the total annual flow will slightly increase . . . the discharge pattern will follow the seasonal requirements for electricity in British Columbia. Thus we can expect low discharge in the summer and high flow in the winter – a reversal of the natural water regime . . . This reduction in water area and the concomitant lowering of the water table is expected to cause significant changes in the vegetation pattern, such as encroachment of willows into sedge meadows, and to have detrimental effects on waterfowl and muskrat habitats.*
>
> The Peace-Athabasca Delta is important for waterfowl production, but is particularly renowned as a moulting area and as a staging area for the fall migration of ducks and geese. It has also been a significant producer of muskrats and other furbearers – an important source of income for the approximately 1,500 Indian and Metis residents of Fort Chipewyan and vicinity.[99]

By 1970, concerns over the environmental impact on the delta began to intensify. On January 11, 1970, an internal memorandum to Jack Davis, the federal Minister of Fisheries and Forestry, recognized the impact the Bennett Dam was having on areas of federal responsibility:

> The problem of low flows in the Peace River, as a result of the Bennett Dam in British Columbia, is a major concern of the Federal Government, because the area primarily affected, that is the Delta of the Athabaska (sic) and Peace Rivers in Lake Athabaska, lies within Wood Buffalo National Park. The Federal Government has responsibilities in addition because lower water levels in Lake Athabaska may affect navigation downstream on the Slave and Mackenzie Rivers. . . .
>
> *Ecologists have stated that a continuation of low water levels in the Athabaska Delta will permanently damage the vegitation* [sic] *and in turn the animal life. They say that it is especially necessary that high-level flood flows should enter the*

99 Canadian Wildlife Service, Prairie Migratory Bird Research Centre, Annual Progress Report, 1969-70, H.J. Dirschl, "Ecological Evaluation of the Peace-Athabasca Delta," March 1970 (ICC Exhibit 1A, tab 2, ICC pp. 47-48). Emphasis added.

> *Delta not later than the spring of 1972, in order to avoid permanent damage.* It is clear that the basic principles of our National Parks, i.e., to preserve examples of Canada's national habitat, may be endangered in this case. *In addition, as a result of damage to fish and muskrat stocks, the welfare of Indians and Metis people in this area is in jeopardy.*[100]

The memorandum also confirms that the federal government organized a Federal-Provincial Task Force (with representatives from Canada, Alberta, Saskatchewan, and British Columbia) to study the ecological and social problems associated with the dam and offer its recommendations within 11 months on remedial measures and "engineering solutions for both the immediate and long term restoration and management of the Delta." However, representation of BC officials on this task force – and others that would follow – was short-lived, and there is no record before the Commission that the task force completed its mandate and made any recommendations in regard to the delta.

In June 1970, an ad hoc group of 13 concerned scientists led by W.M. Schultz submitted a report entitled *Death of a Delta – A Brief to Government* to the Prime Minister of Canada, Pierre Trudeau, and the Premier of Alberta, H.E. Strom, along with "a plea for action to halt further deterioration of the Delta region in Northeastern Alberta." The report summarized the impacts of the Bennett Dam on a broad range of subjects relating to hydrology, national park values, waterfowl use, fur trapping, fishing and hunting, the local economy, transportation, and recreational and tourist potential. Under the heading "Human Values and Civil Rights," the report states:

> The disruption and dislocation of a way of life for many northern Alberta people have not been considered. They are to be deprived of a means of livelihood without so much as an attempt being made by provincial or federal governments to investigate in advance in what ways the construction of the dam would affect them. They should, as residents of Alberta, have been adequately informed as to the consequences of regulation of the Peace River, and they should have had representations made on their behalf before it was too late to do anything about it.[101]

In view of these concerns, the report recommended that the affected governments take immediate action to study the present and anticipated conditions

100 John Mullally, Executive Assistant, Office of the Minister of Fisheries and Forestry, to A.T. Davidson, January 11, 1970 (ICC Exhibit 1B, tab 12B, ICC pp. 266-67). Emphasis added.

101 Peace Athabasca Delta Committee, *Death of a Delta - A Brief to Government* (Edmonton: Peace Athabasca Delta, 1970) (ICC Exhibit 2A, tab 9, ICC p. 594).

in the delta with a view towards remedial measures to restore the delta to its pre-dam condition. In the event that such restoration is not possible, the report stated, compensation should be provided to Alberta residents directly affected by the dam.[102]

On July 2, 1970, Alberta Premier Harry Strom wrote to Prime Minister Pierre Trudeau in regard to the concerns raised in *Death of the Delta* and the "growing controversy over the W.A.C. Bennett Dam in British Columbia and its effects on the water levels of Lake Athabasca, particularly with respect to the delta area in the vicinity of Fort Chipewyan." Premier Strom wrote:

> In addition to the observed disbenefits to the trapping industry, and the anticipated adverse results to the commercial fishing industry over the entire lake, affecting the livelihood of 1,500 people, a wildlife habitat of 1,000 square miles is being subjected to drastic change. Although it is difficult to predict at this time what the final outcome of this change might be, indications are that Canada will lose one of the most significant natural ecological environments to be found anywhere on the North American Continent.
>
> The widespread ramifications of the situation have given Alberta cause for concern. However, the problem is not of Alberta's making. The majority of the affected area is under Federal jurisdiction, and the ramifications of the problem, as well as its cause, have national implications. Therefore, the Government of Alberta contends that the Government of Canada has a responsibility and an obligation to rectify the present situation. I am sure you will agree only Canada can be held responsible for any detrimental effects that may accrue in the future.[103]

Premier Strom requested that Canada take "some remedial action, even if only temporary or experimental in nature," before it was "too late to effectively salvage the situation at all." For its part, Alberta had already undertaken studies and data collection through the Water Resources Division.

Premier Strom's letter triggered a flurry of activity within federal government agencies and departments. On July 13, 1970, the Deputy Secretary to the Cabinet (Federal-Provincial Relations) wrote to the Deputy Minister of Energy, Mines, and Resources, J. Austin:

> The Department of Indian Affairs and Northern Development has, of course, a direct interest as it relates to national parks territory, wildlife within the parklands, and the economic condition of Indian populations; and the Department has consider-

102 Peace Athabasca Delta Committee, *Death of a Delta – A Brief to Government* (Edmonton: Peace Athabasca Delta, 1970) (ICC Exhibit 2A, tab 9, ICC p. 599).

103 John A. MacDonald, Deputy Minister, Public Works, to J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC pp. 271-72).

able background knowledge at its disposal on this problem. Other federal departments will also have certain interests. I believe, however, this question has ramifications which go beyond what remedial action may be taken in Alberta and the North West Territories insofar as they relate to the control of water resources and involve the possibility of negotiations with the Province of British Columbia.[104]

The Deputy Minister was, therefore, requested to convene a meeting among all interested departments, including the Privy Council Office, and to prepare a letter of response for the Prime Minister's signature.

Deputy Minister Austin responded on July 17, 1970, in a detailed memorandum to his Minister regarding the Peace-Athabasca Delta and the Bennett Dam. Key excerpts from Austin's comprehensive memorandum are set out below:

1. Bennett Dam was licensed in 1962 by the Comptroller of Water Rights of British Columbia. Advised by Public Works that a federal permit was required under the *Navigable Waters Protection Act*, the province refused to make application on the ground that the Peace River was not considered navigable at the dam site. Public works referred the matter to the Department of Justice which opined that the Act did apply. *Public Works decided not to press the province, although a memo dated April 18, 1967 by the Deputy Minister of that Department to his Minister indicates that the dam is considered illegal.*

2. The total volume of water to be held in the reservoir behind Bennett Dam is 57 million acre-feet, making it the eighth largest man-made reservoir in the world . . . Minimum releases from the reservoir were governed by the 1962 conditional water license granted by the province. However, in the spring of 1968 outflows were reduced from the 10,000 c.f.s. requirement of the licenses to about 1,000 c.f.s. Low natural runoff at this time aggravated the situation throughout the Mackenzie system.

3. The Schultz Report erroneously attributes the low water levels in the Athabaska [sic] Delta entirely to the Bennett Dam. In fact, the hydrological and ecological effects noted resulted from an unfortunate coincidence of rapid filling of the reservoir behind Bennett Dam *and* below normal precipitation during this period . . .

4. *Damage to wildlife habitat in the vicinity of Lake Athabaska has been immediate and severe.* Some problems for downstream navigation were also experienced (there were other contributing factors here). Over the long-term in which the Peace flows are regulated by the Bennett Dam, the induced changes in river regime should prove beneficial for navigation on the Mackenzie system. *But as a consequence of*

104 E. Gallant, Deputy Secretary to the Cabinet (Federal-Provincial Relations), Privy Council Office, to J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, July 13, 1970 (ICC Exhibit 1b, tab 12E, ICC p. 273).

*the elimination of normal spring flooding, ecological changes will still occur, if less drastically than initially. The ultimate effects of a controlled river on channel scouring, on sedimentation and bank slides, as well as on plant and animal life which had adapted to the natural patterns of fluctuating flow, remain to be determined.*

5. The Schultz report recommends that the outflows of Lake Athabaska be obstructed as a temporary measure to maintain higher levels in the lake . . .

6. The major federal interest involved in the controversy would appear to be:

(a) Navigation. Public Works procrastinated over whether to invoke the *Navigable Waters Protection Act* until it was too late to exert much influence on B.C. Hydro and Power Authority.

(b) Fisheries. The Winnipeg office of Department of Fisheries was of the opinion in the summer of 1968 that the fisheries on the Slave River would not be harmed unless levels fell below those forecast at that time.

(c) Wildlife. National Parks. The Migratory Birds Treaty as administered by the Canadian Wildlife Service and National Parks policy as administered by the National and Historic Parks Branch seemed to play no important role in the earlier stages of the controversy. Both agencies were in the former Department of Northern Affairs and National Resources, but little consultation seems to have taken place on the Peace developments between them and the Water Resources Branch of that Department.

(d) Federal Proprietary Rights in Indian Reserves and in the Northwest Territories. *Damages from reduced flow downstream on riparians which included an Indian reserve and trapping and navigation users in the Territories might have been used to make representation to British Columbia, but were not.*

(e) Interprovincial River Conflict. Federal involvement to resolve a controversy between two provinces over the use of a common river was made difficult because the province of Alberta never registered any formal complaint, to the best of our knowledge.

Federal agencies throughout seemed to take little active interest in the Peace development beyond downstream navigation.[105]

On July 20, 1970, the Deputy Minister of Indian Affairs, H.B. Robinson, wrote a letter to Deputy Minister Austin identifying his Ministry's "vital interest" in the impacts of the Bennett Dam:

105 J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, Memorandum to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76).

> Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and on Lake Athabasca, not to mention the commercial fishing activity. Also there has been a very serious loss of country food resources for these people to which no dollar value can be assigned. These resources are all now in jeopardy with grave social consequences and the prospect of sharply accelerating welfare costs for this department as well as for the province . . .
>
> Finally, the Delta and the shallow lakes surrounding it form a unique part of the Wood Buffalo National Park and the drastic alteration in the ecology of such a large area reduces park values very significantly . . .
>
> I am told that solutions to the problem will be difficult and could be very costly because of the soil and hydrological characteristic of the Peace-Athabasca Delta. *A much simpler method might be, by arrangement with British Columbia, to arrange for an artificial release of waters from the dam which would, as far as possible, duplicate the spring flood conditions* . . .
>
> The downstream problems associated with the Bennett Dam illustrate additional complex factors which I believe must be taken into account in relation to all water impoundment schemes in the future. In this particular instance the leadership role which I think the Federal Government must play in developing policies and programs is reinforced by the special impact this dam has had in social and ecological terms upon federal interests.[106]

Robinson offered to provide input into the Prime Minister's draft letter of reply to Premier Strom and suggested that a meeting be arranged with interested departments to discuss the matter.

On August 7, 1970, a letter from an undisclosed author in Ottawa to J.J. Greene, Minister of Energy, Mines, and Resources, expressed concerns over the environmental problems in the delta and placed part of the responsibility at the feet of the federal government:

> I find the brief [*Death of a Delta - A Brief to Government*] an objective and oppressive statement of what seems to me to be a disaster attributable in part to the inadequate planning. The fact that most of the Delta lies within a national park implicates the federal government in more ways than one. The fact, too, that some 1,300 Indian and Metis people make a subsistence living in this area is also of serious concern from the federal viewpoint.[107]

106 H.B. Robinson, Deputy Minister, Indian Affairs and Northern Development, to J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, July 20, 1970 (ICC Exhibit 1B, tab 12G, ICC pp. 279-80).

107 To J.J. Greene, Minister of Energy, Mines, and Resources, Ottawa, August 7, 1970 (ICC Exhibit 1B, tab 12K, ICC p. 286). The author of this letter was not disclosed on account of section 19(1) of the *Access to Information Act*.

Following an intensive round of internal consultations, Prime Minister Trudeau responded to Premier Strom's letter on August 12, 1970. He wrote that he shared Premier Strom's concerns regarding the environmental and social consequences of the Bennett Dam and noted that updated information had allowed a clearer picture of the dam's consequences on the delta to emerge. Trudeau's letter went on to outline a proposed strategy to address mutual concerns:

> This does now appear to be a situation in which the consequences of inaction on the part of the government concerned would be most unfortunate. As a first concerted step, therefore, it seems to me that we should seek to make sure that we have a common understanding of the causes, damages and possible remedies. I have asked the Minister of Energy, Mines and Resources to undertake responsibility on the federal side for organizing whatever action is necessary to arrive at this common understanding. I would now like to suggest that there be a meeting of officials to exchange information and undertake a joint examination of the many aspects of this problem as soon as possible. If you are in agreement, and if the Government of British Columbia also agrees, I would hope that such a meeting could take place in late September.[108]

Prime Minister Trudeau wrote a similar letter to Premier Bennett on the same day, but this letter is different in that it reminds the Premier that the "increasingly severe social and environmental conditions existing in Lake Athabasca and the delta area" may have an impact on federal responsibilities relating to "national parks territories, to wildlife within the parklands and to the economic conditions of Indian populations."[109] The Commission has no record of any response to either of the Prime Minister's letters.

On August 14, 1970, the question of whether the federal *Navigable Waters Protection Act* applied to the regulation of flow levels on the Peace River was discussed again in a letter from the Deputy Minister of Public Works to Deputy Minister Austin of Energy, Mines, and Resources. The letter, which summarized events from 1959 to 1966, states that the Deputy Minister of Public Works, Major-General H.A. Young, "reminded" the province of British Columbia of the requirements of the *Navigable Waters Protection Act* (*NWPA*) on October 24, 1962.[110] At that time, the *NWPA* provided that no work could be built on a navigable waterway unless the work, site, and plans

108 Pierre Elliott Trudeau, Prime Minister of Canada, to Harry E. Strom, Premier, Province of Alberta, August 12, 1970 (ICC Exhibit 1B, tab 12M, ICC pp. 291-93).

109 Pierre Elliott Trudeau, Prime Minister of Canada, to W.A.C. Bennett, Premier, Province of British Columbia, August 12, 1970 (ICC Exhibit 1B, tab 12L, ICC pp. 288-90).

110 John A. MacDonald, Deputy Minister, to J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC p. 294).

were approved by the Minister of Public Works prior to the commencement of the operation.[111] On November 7, 1962, the Chairman of BC Hydro and Power Authority, Dr G.M. Shrum, stated its position that the Act did not apply because, according to its legal advice, the dam "structure was sited at a location where no navigation could take place." Public Works, however, was of the opinion that the *NWPA* did apply and that the dam was, therefore, illegal. At any rate, neither the province nor BC Hydro applied for or obtained a licence under the *NWPA*.

Despite Prime Minister Trudeau's request to BC Premier Bennett for a meeting among all interested federal and provincial officials, it appears that the BC government was not prepared to participate in any joint initiative to study the problem and to develop practical solutions to address environmental damages to the delta. According to a November 6, 1970, memorandum to the federal Minister of Fisheries and Forestries, the Canada-Alberta Joint Consultative Committee met in October to consider the problem of low water levels in the delta, but participants at "the meeting deplored the lack of ability to involve B.C. in discussions and there seemed to be a general feeling of helplessness with regard to the situation." The memorandum goes on to state that:

> 4. We have now been told by both Alberta and Saskatchewan fisheries people that serious fish problems exist due to the low water levels resulting from closing the dam to fill Williston Reservoir. Until last week the situation has not been represented as a fisheries problem.
>
> 5. If we can obtain adequate documentation of the fisheries problems then the *Fisheries Act* provides a very effective tool for the initiation of technical discussions with B.C. Hydro (not the B.C. Government). There are many similar instances in the past where once responsibility has been established the owner has cooperated readily to reduce the impact of the problem, i.e. Stellako River, Cheakamus River, Ash River, and most recently at Kettle Rapids on the Nelson River, to name a few. In every case the operative section has been Subsection 10 of Section 20. In each case the problem has been solved through technical discussions based on knowledge, the weight of the law, and with encouragement and support from the executive levels.[112]

111 *Navigable Waters Protection Act*, RSC 1952, c. 193, as amended by SC 1956, c. 41.

112 K.C. Lucas, Director General, Environmental Quality Directorate, to the Minister, November 6, 1970 (ICC Exhibit 1B, tab 120, ICC p. 296). Section 20(1) of the *Fisheries Act*, RSC 1970, c. F-14, stated that "[t]he owner of any slide, dam, or other obstruction shall permit to escape into the riverbed below the said slide, dam, or other obstruction, such quantity of water, at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon."

On December 9, 1970, Jack Davis, the Minister of Fisheries and Forestries, wrote to his counterpart in British Columbia, Ray Williston, Minister of Lands, Forests, and Water Resources, to request the province's cooperation. Davis's letter raised concerns about the negative effects of reduced water levels on the delta and proposed some solutions:

> Our records show, also, that the local muskrat population is disappearing and fish spawning areas have been adversely affected. Should these low levels continue the local ecology could be adversely effected for a long, long time to come.
>
> In addition the livelihood of about 1700 Metis and Indians in the Fort Chipewyan area is effected. This is particularly true of those who rely heavily on the fisheries for gainful employment.
>
> There is a bright side to the question however.
>
> *Given certain precautions, especially in 1971, it is possible that a regime of discharges from the W.A.C. Bennett Dam may be preferable to the variations which were historically characteristic of the Peace River. Damaging floods will be a thing of the past and extremely low flows can also be avoided as long as there is close cooperation between the relevant authorities in B.C., Alberta and the Northwest Territories.*
>
> Rock-filled dams on the outlet channels from the Peace-Athabasca Delta might have a favourable effect on the local ecology. *Another possibility is that of water releases from the W.A.C. Bennett Dam on an appropriate seasonal schedule. Neither of these alternatives, however, can be investigated intelligently until B.C. Hydro's operating pattern of the W.A.C. Bennett Dam for power production is known with some degree of certainty.*[113]

Although Davis sought the cooperation of Mr Williston and the BC government by asking them to provide relevant data on the operation of the dam and by requesting their involvement in joint discussions with the governments of Alberta and Canada, the evidence suggests that British Columbia did not accept his overture at this time, since there was no record of a response to Davis's letter.

On December 1, 1970, a Statement of Claim was filed in the Supreme Court of British Columbia on behalf of numerous individual plaintiffs, the Athabasca Fish Co-Operative Limited, the Metis Association of Alberta, the Cree Band at Fort Chipewyan, and Fred Marcel and Patrick Mercredi, "each of them suing on his own behalf as a Councillor and member of the Chipewyan Indian Band." The action against the BC Hydro and Power Authority claimed damages for nuisance, wrongfully interfering with the Peace River,

113 Jack Davis, Minister, Fisheries and Forestry, to Ray Williston, Minister, Lands, Forests, and Water Resources, Victoria, BC, December 9, 1970 (ICC Exhibit 1B, tab 12P, ICC p. 298). Emphasis added.

and an injunction was sought to restrain BC Hydro from interfering with the Peace River.[114] According to elders' testimony in this inquiry, the First Nation was unable to pursue this action because of a lack of resources.[115] In any event, the matter never came before the courts.

**Efforts to Mitigate Environmental Damage to the Delta**

As mentioned earlier, *Death of a Delta – A Brief to Government* recommended that the governments concerned take immediate action to address the detrimental effect of the Bennett Dam on the ecology and economy of the delta area. The governments of Canada, Saskatchewan, and Alberta responded to growing concern and pressure over the delta by establishing the Peace-Athabasca Delta Project Group (PADPG) in 1971 to review and to assess the environmental damage caused by the dam. In addition, the group was to devise and to implement a strategy for combatting the continuing environmental deterioration in the delta. The BC government and BC Hydro did not participate in the PADPG.[116]

The two-year PADPG study was the first to conduct a systematic assessment of the Bennett Dam's potential contribution to reduced water levels in the delta and changes in the ecosystem affecting waterfowl, fish, and aquatic furbearer populations and vegetation succession. The study confirmed that the Peace River project had altered the flow regime of the Peace River and that water levels were significantly lower in the delta system. The resulting changes had been most severe during the initial filling of the reservoir, and it was expected that as long as the dam continued to operate, it would cause "continued, although less severe, changes in the ecology of the Delta" than was experienced in the first few years.[117]

One of the principal concerns of the PADPG related to the dramatic effect that the Peace River can have on water levels in the delta:

> Flood flows on the Peace River adjacent to the Peace-Athabasca delta were reduced by as much as 200,000 cubic feet per second, and this reduction in flows meant that the river levels were as much as 10-12 feet lower they would have been without regulation. The low flows on the Peace River permitted water to flow out of Lake Athabasca much more rapidly than normal during spring and summer.[118]

114 Statement of Claim, December 1, 1970 (ICC Exhibit 2A, tab 9, p. 602).
115 Lawrence Courtoreille, member of the Mikisew Cree First Nation, ICC Transcript, November 27, 1996, pp. 129 and 149.
116 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, ICC p.15).
117 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, ICC p. 15).
118 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, pp. 15-16).

In an effort to restore temporarily the water levels in Lake Athabasca and the other major lakes in the delta system during the filling of the Bennett Dam, the PADPG constructed a rock weir on the Quatre Fourches Channel in 1971. The weir was successful in restoring water levels to approximately 60 per cent of the delta, but it was removed because it contributed to severe flood damage in 1974.[119]

In response to the PADPG study and the deterioration of the Peace-Athabasca Delta, Canada, Alberta, and Saskatchewan entered into an agreement in September 1974 which, among other things, mandated the parties to "assign a high priority to the conservation of the Peace-Athabasca Delta."[120] The Agreement established the Peace-Athabasca Delta Implementation Committee (PADIC) as the body to carry out further studies and strategies that were necessary for the preservation of the delta. A fixed crest weir was first constructed on the Rivière des Rochers during 1975, and another rock weir was built on the Revillon Coupé in 1976. Follow-up studies to measure the efficacy of both these projects indicate that the weirs were not successful in restoring peak summer levels to pre-dam conditions in Lake Athabasca. The studies also indicate that the weirs were responsible for raising the winter levels of the lake by 0.6 metres above pre-dam levels. Most important, the weirs have reduced the annual fluctuations in Lake Athabasca and the Peace and Athabasca Deltas, which were essential to sustain the pre-dam ecology.[121]

The First Nation also attempted to restore some of the small lakes that have been lost since the dam was built. In 1986, the Athabascan Chipewyan Band began a program to "rewater" some of the perched basin lakes located within IR 201 in an effort to restore the muskrat habitat. Assessments of the effectiveness of rewatering Sucker, Killer, Big Egg, and Frezie Lakes revealed that muskrat numbers increased from 1136 in 1986 to 17,497 in 1988. Using 1974 as a peak harvest year (156,769 muskrat pelts), post-dam harvest levels from 1977 to 1988 are still only about 9 per cent of the peak harvest, and about 8 to 22 per cent of the potential harvest that could be obtained under optimal management of wetland areas. While the program restored a small portion of the former muskrat population to those lakes, the overall numbers are still well below pre-dam estimates.[122]

119 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, p. 16).

120 Peace-Athabasca Delta Implementation Committee, Canada, Alberta, Saskatchewan, *Peace-Athabasca Delta, Water Management Works Evaluation, Final Report*, April 1987 (ICC Exhibit 1A, tab 6, ICC p. 166). Agreement between the Government of Canada, the Government of the Province of Alberta, and the Government of the Province of Saskatchewan, September 16, 1974.

121 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, p. 16).

122 Green, "Preliminary Assessment" (ICC Exhibit 2A, tab 7, pp. 26-27).

**Impact of the Dam on the Delta and Indian Reserve 201**

By letter dated October 7, 1996, counsel for Canada and the First Nation agreed to assume for the purposes of this inquiry that the construction and operation of the Bennett Dam have caused damages to IR 201.[123] Although Canada is not foreclosed from producing further evidence and arguments to rebut the compelling evidence before us, that evidence leads inescapably to the conclusion that significant environmental damage was sustained by the First Nation and IR 201 by the construction and operation of the Bennett Dam. No other conclusion is possible from the *prima facie* evidence before us.

The initial flooding of the reservoir above the dam resulted in immediate reductions in the water flow. Water levels remained low for three succeeding years after 1967, and Lake Athabasca dropped 4-5 feet below pre-dam levels. Shallow lakes in the delta were reduced to mud flats, and in the winter some lakes froze to the bottom.[124] The vegetation almost immediately began a "transition toward dominant willow communities."[125] This process occurs normally over many years when water levels are naturally reduced, but because of the dam this process was accelerated. The willows replace former species, and this change may in turn alter habitat or food sources for animals dependent on them.

Planning and construction of the Bennett Dam begun as early as 1957. Yet the Athabasca Chipewyan First Nation and other residents of the Fort Chipewyan area had not been informed of the dam or warned about its potential effects on the delta by officials of BC Hydro or the federal government.[126] During the Commission's community session, Victorine Mercredi stated that members of the First Nation were not aware of the dam until the delta began to dry out:

123 François Daigle, counsel, Department of Justice, to Jerome Slavik, Counsel, Athabasca Chipewyan First Nation, October 7, 1996 (ICC file 2108-8-1).

124 Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

125 Peace-Athabasca Delta Project Group (PADPG), *The Peace Athabasca Delta: A Canadian Resource* (Alberta: PADPG, 1973), as quoted in Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Albert, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

126 Adams, "Changing Way of Life," p. 10 (ICC Exhibit 18, tab 1), states that the "study team found only one person in Fort Chipewyan who recalls that he was aware of the Peace River hydro-electric project prior to 1965. That person is Athabasca Chipewyan First Nation member Charlie Voyageur, who worked as a driller conducting tests on the dam site. He cannot recall thinking or having it brought to his attention that the dam might have impacts on the people of the delta and Fort Chipewyan."

> This Reserve #201 and all the muskrat one day started to decline. At that time people were not aware of what was causing the declining [sic] of the muskrat and the water because nobody came to them to tell them what was happening.[127]

Mrs Flett also testified that the First Nation was never informed of the dam:

> No one has ever approached or notified us why the water was drying up. Since the Reserve started drying in 1966, from there on, every year more water was going and more lakes were drying up, until finally there was almost totally no water on the Reserve until it all dried and the willows and everything had grown in.[128]

In the years following completion of the dam, dramatic changes appeared in the delta's basins. When the dam was completed, the water flow in the Peace River was altered and the backflooding, so essential to the preservation of the delta, was greatly reduced. This phenomenon disrupted water flows in all areas of the Peace-Athabasca Delta.

Fish stocks were reduced as shallow lake levels dropped. The fish use shallow lakes for wintering and spawning. When some lakes froze to the bottom in winter or became stagnant and unable to sustain life, the stocks dropped.[129] Waterfowl were similarly affected. There was a dramatic decrease in the amount of available shoreline and nesting habitat as waterways dried up. With decreased water levels, there were fewer available stop-over points for the migrating flocks, and some areas became unsuitable for their use.

Of the many species that were adversely affected by the Bennett Dam, few were harmed more than the small water-borne rodent, the muskrat, which provided a primary source of income and food for the Chipewyan. Muskrat numbers were reported to have fallen drastically in the years after the construction of the dam. The minimum optimal depths for muskrats, which in 1971-72 ranged from 2.5 feet to 2 feet, could not be sustained in much of the muskrats' pre-dam habitat:

> At present, 70 percent of the Delta lakes do not fulfil these requirements. Approximately 45 percent of the muskrat population survived the winter of 1971-72. The

127 ICC Transcript, October 10, 1996, pp. 39 and 44 (Victorine Mercredi).
128 ICC Transcript, October 10, 1996, p. 49 (Eliza Flett).
129 Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

shallower lakes were characterized by high mortality rates and numerous signs of predation.[130]

Other fur-bearing species, such as mink and fox, also declined in population because they relied on the muskrat as a primary food source. Thus, the entire food chain was effected by the reduced water levels in this delicate ecosystem.

Since the completion of the Bennett Dam in 1967, a wide range of research studies by various individuals and groups has explored the hydrological and environmental ramifications of the Bennett Dam on the Peace-Athabasca Delta. In 1992, a report by Jeffrey Green reviewed much of the existing research and related that data to the hydrology, the natural resources, and the use of those resources in and around IR 201. A number of his main research findings are set out below:

1 The reduced frequency and magnitude of flood stages on the Peace River has greatly reduced the hydraulic damming of outlets from the Peace delta and Lake Athabasca to the Slave River. In turn, the lowered water levels in the Peace delta and Lake Athabasca has greatly reduced the backflooding of the Athabasca River and tributaries to Lake Claire and Mamawi. The disruption of this backflooding regime has lead to greatly reduced and infrequent recharging of perched basin lakes and wetlands on the Athabasca delta. Effects have been especially severe on the northern two thirds of the Chipewyan Reserve No. 201.

2 The stabilization of Lake Athabasca by the weirs on the Riviere des Rochers and Revillon Coupé has resulted in above average minimum water levels overwinter, as well as above average year round lake levels. The summer peak levels, however, are 0.5 metres below average. The net effect of these changes has been to reduce the amplitude of flooding during the spring and early summer, and to reduce open mud flats during fall and early winter. These changes have, in turn, reduced wetland habitat availability and quality for a large number of wildlife species and fish of importance to the Chipewyan people.

3 Changes in vegetation as a result of the drying out of the Athabasca delta has lead to reduced availability of some medicinal and food plants for the Chipewyan people, as well as reductions in the availability of productive wetland and meadow habitats and ecosystem integrity.

130 Peace-Athabasca Delta Project Group (PADPG), *The Peace Athabasca Delta: A Canadian Resource* (Alberta: PADPG, 1973), as quoted in Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984 (ICC Exhibit 2A, tab 8, ICC p. 492).

4 Numbers of waterfowl throughout the Athabasca and Peace deltas are believed to have declined as a result of reduced nesting and brood rearing habitat, and the loss of large areas of suitable fall staging habitat. The net effect to the Chipewyan people is a loss of subsistence hunting opportunities during the spring and fall, as well as a reduced potential for a guided sports hunting industry.

5 Muskrat have declined substantially since the operation of the Bennett dam, with the exception of a short recovery associated with the exceptional flood in 1974 and attempts by Athabasca Chipewyan Band to manage wetlands in the No. 201 Reserve.

Muskrat numbers on the Reserve following the construction and operation of the Bennett dam (and prior to wetland management on the Reserve) are in the order of 5 to 11% of previous numbers. Fur harvests realized during the post-dam conditions (1977 to 1988) are in the order of 9% of the peak harvest in 1974, and 8 to 22% of the potential harvest under optimal managed wetland conditions. Maximum losses of trapping income for muskrat pelts alone are in the order of $40,000 to $123,000 annually. The reductions in muskrat numbers has also negatively affected the abundance of other furbearers such as mink and fox, and ultimately the economic potential of trapping income for these species.

6 Changes in habitat quality and availability have negatively affected the distribution and numbers of moose on and adjacent to the Reserve No. 201. In turn, this has greatly affected the ability of the Chipewyan band members to obtain moose meat from the Athabasca delta, and has required travel to areas well outside the Athabasca delta to hunt, as well as increased dependency on store-bought meat sources. The economic cost of these changes are not known.

8 Lower water levels have affected the ability of hunters to travel in the Reserve No. 201, as well as transportation of people and goods to and from the Reserve and Fort Chipewyan, and access to upstream areas (e.g., Fort McMurray).

9 Cumulative effects of vegetation changes, reductions in waterfowl, muskrat, moose and other wildlife, and more difficult travelling conditions has resulted in reduced interest by young people in traditional lifestyles and pursuits. In turn, the spiritual and cultural values of the Athabasca Chipewyan people has been detrimentally affected. . . .[131]

Green concluded that the changes wrought by the construction and operation of the Bennett Dam greatly affected the ability of the First Nation to sustain traditional harvesting activities on IR 201:

> The overall effect of these changes has been a gradual deterioration of the ability of the Reserve No. 201 lands to sustain traditional harvesting and lifestyles, while increasing the costs for individuals to continue subsistence harvesting. In particular, losses of fur trapping opportunities have reduced cash incomes for some Band mem-

131 Green, "Preliminary Assessment," pp. 31-33 (ICC Exhibit 2A, tab 7, ICC pp. 476-78).

bers, while reduced opportunities for hunting of waterfowl, moose and other game on the Reserve has increased costs for hunting-associated travel to off-Reserve areas . . . As these opportunities have declined and costs increased, many Band members appear to have abandoned long-term use of much of the Reserve lands and have become increasingly dependent on store-purchased foods and supplies from Fort Chipewyan and Fort McMurray.[152]

In 1991, the Northern Rivers Basin Study Board was established to produce a study and make recommendations to ministers representing the governments of Canada, Alberta, and the Northwest Territories on issues affecting the waterways. The BC government did not participate in the study. After four and a half years of scientific study, the Board published its report, *Northern Rivers Basin Study*, in 1996 and made a number of sweeping recommendations and conclusions. Among its various findings, the study emphasized the relationship between the reduction in periodic spring flooding and the adverse environmental impact on the delta:

> The backflooding of the three channels by the Peace plays an important role in maintaining the delta wetlands. Many of the small lakes of the delta exist as "perched basins" that are only replenished through the periodic, spring ice jam flooding by the Peace River. However, since the construction of the Bennett Dam, these floods have been rare and less extensive. As a result, many of the marshy areas of the delta are transforming into terrestrial landforms dominated by willows and sedges.
>
> The transformation is of concern to both ecologists and local residents. Residents of Fort Chipewyan, located on the shores of Lake Athabasca, rely on the delta for fishing, hunting and recreation. During the heyday of the fur trade, Fort Chipewyan was renowned for the quantity and quality of its muskrat pelts. However, many of the marshes are now too shallow for muskrats to overwinter. Falling water levels have also decreased habitat for waterfowl and fish.[153]

The regulation of water flow of the Peace River downstream of the Bennett Dam is no longer determined by seasonal variations but rather by the demand for electricity by consumers inside and outside the province of British Columbia. According to the *Northern Rivers Basin Study*:

> Prior to regulation, the Peace River displayed seasonal flow patterns similar to other northern rivers dominated by snowmelt runoff – high flows in the spring and summer, and low in late fall and winter. The Bennett Dam has affected this pattern. While the annual amount of water flowing out of the dam is the same as before regulation, the timing of these flows has been altered. The dam releases significantly

152 Green, "Preliminary Assessment," p. 33 (ICC Exhibit 2A, tab 7, ICC p. 478).
153 *Northern Rivers Basin Study*, 23 (ICC Exhibit 3).

> greater amounts of water during the cold months to meet rising power demands, and tends to store more water in the summer to refill the reservoir.[134]

This demand for power has not only reduced the mean annual peak flows of the Peace River but, in turn, it has also reversed the natural flood patterns in the delta.

The Commission heard oral evidence from Mr W. Veldman, a respected engineer and hydrologic consultant, who considered the conclusions of the this study "extremely credible"[135] and reaffirmed the following conclusions from the study:

> It is long established that the decrease in summer flows due to regulation have reduced water levels in the lakes and channels of the Peace-Athabasca Delta . . . Ecological changes have continued since the filling of the [Williston Lake] reservoir, due in large part to the disruption of ice and flood patterns. Water levels in the basins are replenished only through overland floods. The floods occurred approximately every second year during the 1960s prior to regulation, but only three times since. Historical records reveal that major flood peaks were produced twice during ice break-up in the spring.[136]

It is evident from the following summary of key findings and recommendations on the effects of the dam that the *Northern Rivers Basin Study* intended to send a clear and emphatic message to the governments responsible for addressing the impacts of the Bennett Dam on the Peace-Athabasca Delta:

> NRBS studies confirm that the dam has a significant impact on the flow patterns, sediment transport, river morphology, ice formation and habitat along the mainstream Peace River.
>
> Changes to flow and ice patterns are at least partly responsible for the lack of ice-jam induced floods in the Peace-Athabasca Delta. In the absence of these floods, the delta is slowly drying out – profoundly affecting the natural environment and the traditional lifestyles of local residents . . .
>
> Several attempts have been made to replenish water levels in the Peace-Athabasca Delta. These efforts have successfully restored water levels in the lower lakes and channels but could not flood the elevated lakes (or "perched basins"). Several new and potentially more effective options were identified within the NRBS and one of its companion initiatives – the Peace-Athabasca Delta Technical Studies.

---

134 *Northern Rivers Basin Study*, 62 (ICC Exhibit 5).
135 ICC Transcript, October 10, 1996, p. 104 (Wim Veldman, Civil Engineer, Calgary, Alberta).
136 Adams, "Changing Way of Life" (ICC Exhibit 18, tab 1, p. 66).

In light of improved understanding of the mechanisms controlling flooding of the Peace-Athabasca Delta, the Board feels that these new remediation options warrant consideration. *Accordingly, the Board recommends that the governments of Canada, Alberta and British Columbia implement an action plan for remediating the Peace-Athabasca Delta . . . in consultation with affected basin residents.*

Previous remediation attempts were frustrated by the absence of natural flow patterns on the Peace River. The Board stresses that economic factors in hydroelectric production must not take precedence over environmental stability. *The Board recommends as a principle for any future negotiations regarding mitigation measures, that the operational regime of the Bennett Dam be modified to aid the restoration of the Peace River and the Peace-Athabasca Delta . . .*[157]

The federal government and the governments of Alberta and the Northwest Territories are currently formulating their responses to the many recommendations contained in the study. It is not known whether the BC government intends to respond to the recommendations.

157 *Northern Rivers Basin Study*, 8 (ICC Exhibit 3). Original emphasis.

# PART III

## ISSUES

In this inquiry, the Commission was asked to determine whether Canada owes an outstanding lawful obligation to the First Nation in relation to damages sustained by the First Nation and to IR 201 as a result of the construction and operation of the Bennett Dam. The parties agreed to frame the issues before the Commission as follows:

1. Does Her Majesty in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development have a statutory or fiduciary lawful obligation to the Athabasca Chipewyan First Nation [ACFN] to have prevented, mitigated or sought compensation for environmental damages to Indian Reserve #201 caused by B.C. Hydro?
2. If so, what is the nature and extent of the Crown's statutory and fiduciary obligation for environmental protection of Reserve land?
3. In the facts and circumstances of this case, did the Crown meet their statutory and fiduciary obligations to the Band?[158]

The parties also provided additional submissions on the following issue:

4. Did the Crown breach the ACFN's treaty rights by allowing an unreasonable and unjustified interference with the ACFN's hunting, fishing, and trapping rights on Reserve #201?

For the purposes of our analysis, we intend to review these issues in the context of what we consider to be the central issue – that is, whether the Crown had a fiduciary duty to the First Nation to prevent, mitigate, or seek compensation for the infringement upon the exercise of the First Nation's treaty rights and for damages caused to IR 201 by the construction and operation of the Bennett Dam. Issues surrounding the nature and scope of treaty

158 ICC Planning Conference Summary, May 17, 1996.

rights and whether the Crown owed a statutory duty to protect IR 201 shall be addressed in the course of answering that central question.

As noted above, counsel for Canada and the First Nation agreed to assume for the purposes of this inquiry that the construction and operation of the Bennett Dam caused damages to IR 201. In order to dispose properly of the arguments before us, however, it has been necessary for the Commission to make findings on the *prima facie* evidence regarding the effect of the Bennett Dam on the Peace-Athabasca Delta and IR 201. Since Canada has not made any admission of fact or liability in relation to causation and has reserved the right to challenge the evidence or present further evidence on this point, we offer our findings on the *prima facie* evidence. These findings are subject to rebuttal by Canada upon production of additional scientific evidence on whether the Bennett Dam caused or contributed to the drying of the delta and the perched basins on IR 201.[139]

Part IV of this report sets out our analysis and findings on the legal issues placed before the Commission in this inquiry.

139 A. François Daigle, Counsel, Specific Claims Ottawa, to Jerome Slavik, Ackroyd Piasta, Roth & Day, October 7, 1996 (ICC file, 2108-08-1).

# PART IV

## ANALYSIS

### ISSUE 1: STATUTORY AND FIDUCIARY OBLIGATIONS OF THE FEDERAL CROWN

Does Her Majesty in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development have a statutory or fiduciary lawful obligation to the Athabasca Chipewyan First Nation to have prevented, mitigated or sought compensation for environmental damages to Indian Reserve #201 caused by B.C. Hydro?

If so, what is the nature and extent of the Crown's statutory and fiduciary obligation for environmental protection of Reserve land?

In the facts and circumstances of this case, did the Crown meet their statutory and fiduciary obligations to the Band?

**Fiduciary Obligations of the Crown**

Although a number of decisions of the Supreme Court of Canada have established that the Crown owes certain duties to First Nations in the management and protection of their reserve lands, this inquiry raises a novel issue because the First Nation submits that the federal Crown has a fiduciary duty to take positive steps to protect reserve land from exploitation, interference, or damage *caused by third parties*.[140] Canada contends that, although the courts have been clear that a general fiduciary *relationship* exists between the Crown and First Nations, not every aspect of that relationship gives rise to a legally enforceable fiduciary *duty* or *obligation*.[141]

To determine whether the Crown owed a fiduciary obligation to the Athabasca Chipewyan First Nation in this case, it is important to recognize the

140 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 59.
141 Submissions on Behalf of the Government of Canada, September 8, 1997, p. 20.

general principle that aboriginal people stand in a fiduciary relationship to the Crown. Any doubt about this has been laid to rest by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[142]

It is clear from this plain statement of the law that the relationship between the Crown and aboriginal peoples is inherently fiduciary in nature, but the Supreme Court of Canada has also emphasized that not every aspect of the relationship will give rise to an enforceable fiduciary obligation. The scope and content of the Crown's specific fiduciary duties can only be determined through a meticulous examination of the nature of the relationship between the Crown and the First Nation in question. The recent decision of the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada* confirms that this is the preferred approach of the courts:

> The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian band in question in order to define the nature and scope of that obligation.[143]

Before analyzing the specific nature of the relationship between the First Nation and the Crown, we wish to provide a brief overview of the general legal principles concerning fiduciary obligations to assist in determining whether the facts attract an application of the fiduciary doctrine in this case.

142 *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147; [1994] 1 SCR 159 at 183.

143 *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 at 23 (CA).

### *General Fiduciary Principles*

The decisions of the Supreme Court of Canada in *Guerin v. R.* and *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)*, more commonly known as the *Apsassin* decision, demonstrate that the Crown has an enforceable fiduciary duty in the context of reserve land surrenders to ensure that Indians are not exploited in such transactions with third parties.[144] We also know from the Court's decisions in *R. v. Sparrow* and *R. v. Van Der Peet* that the Crown has a fiduciary obligation to justify the exercise of legislative or regulatory powers that infringe upon existing aboriginal or treaty rights.[145] The difficulty in this inquiry is that no case law has dealt with facts similar to those before us. We must, therefore, determine whether a fiduciary duty exists by reviewing the major decisions dealing with fiduciary obligations in the private law and in the context of the Crown-aboriginal relationship.

The starting point in this analysis is the landmark decision of the Supreme Court of Canada in *Guerin v. R.* In *Guerin*, Mr Justice Dickson, writing for the majority of the court, held that the Crown's historic undertaking in the *Royal Proclamation of 1763* and the *Indian Act* provided the source of a distinct fiduciary obligation to protect the Indians' interests in reserve land for their collective use and benefit. Dickson J made the following findings about the Crown's fiduciary obligations, after discussing the rationale behind the surrender requirement in the *Royal Proclamation of 1763* and the *Indian Act*:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, *Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie*. This is the effect of s. 18(1) of the *Act*.[146]
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains . . . that "the hallmark of a fiduciary relation is

144 *Guerin v. R.*, [1984] 2 SCR 335 at 383, and *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370-71 [*sub. nom.* and hereinafter *Apsassin*].
145 *R. v. Sparrow* (1990), 70 DLR (4th) 385 and *R. v. Van Der Peet* [1996] 2 SCR 507.
146 Section 18(1) of the *Indian Act* reads as follows:

> 18.(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

that the relative legal positions are such that one person is at the mercy of the other's discretion." Earlier . . . he puts the point in the following way:

> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that *where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.*

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[147]

Outside the established categories where a fiduciary relationship is presumed to exist (e.g., trustee-beneficiary, doctor-patient, solicitor-client), the courts have sought to identify the underlying principles governing the imposition of a fiduciary obligation on a new relationship. In *Frame v. Smith*, Wilson J offered the following principles as a "rough and ready guide" for the courts to apply in determining whether fiduciary obligations arise in different factual circumstances:

> There are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[148]

147 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383-4, [1985] 1 CNLR 120 at 137. Emphasis added.
148 *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 at 99.

Justice Wilson's "rough and ready guide" has been applied by the Court in numerous cases following *Frame* and has become an accepted approach for determining whether a fiduciary relationship exists outside the established categories.[149]

In *Hodgkinson v. Simms*, Mr Justice La Forest discussed some of the difficulties encountered by the courts in applying Wilson J's guidelines in *Frame v. Smith*, by reference to what he characterized as the three "uses" of the term "fiduciary":

> The first [use of the term fiduciary] is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in [*International Corona Resources Ltd. v. LAC Minerals Ltd.*[150]], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary" [i.e. the second use], viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship . . . *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.*
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.[151]

Central to La Forest J's reasoning was his finding that relationships characterized by unilateral discretion are simply a species of a broader family of relationships referred to as "power-dependency" relationships, which he described as follows:

149 See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534; *M.K. v. M.H.*, [1992] 96 DLR (4th) 289 (SCC); and *Norberg v. Wynrib*, [1992] 4 WWR 609 (SCC).

150 *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574.

151 *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 409.

> [I]n my view, *the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking gains a position of overriding power or influence over another party.*
>
> . . .
>
> [T]he law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. . . . *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*
>
> In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion is somehow "unilateral". . . *Ipso facto*,[152] persons in a "power-dependency" relationship are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures.[153]

It is clear from this passage that La Forest J is advancing the notion of "reasonable expectations" as the underlying fiduciary principle that gives rise to fiduciary duties outside the established categories. For the purposes of this inquiry, it is therefore important to remember that the reasoning in *Guerin* regarding obligations created through the operation of statute, agreement, or unilateral undertaking is not an absolute rule but rather a guide to identifying whether a "power-dependency" relationship exists. Such obligations can also arise out of a particular course of conduct, which creates reasonable expectations that one party will act on behalf of another. Nor is it necessary that there be a specific undertaking or obligation in the sense that it must be express. Fiduciary obligations can be express or implied.

To determine whether the Crown had a fiduciary duty on the facts of this case to protect and preserve the First Nation's reserve land, we shall have regard to the "reasonable expectations" of the parties and whether the indicia identified in the "rough and ready guide" from *Frame v. Smith* are present in this case.

### *Scope for the Exercise of Discretion or Power*

The essential question in determining whether the Crown had scope for the exercise of discretion and power to act on behalf of the First Nation relates to

152 The Latin phrase *ipso facto* means "by the fact itself" or by "the mere fact" (*Black's Law Dictionary*).
153 *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 411 and 412-13. Emphasis added.

whether the Crown had undertaken to protect reserve land on behalf of the First Nation by statute, agreement, unilateral undertaking, or through a particular course of conduct. After careful consideration of the arguments presented by Canada and the First Nation, we find that the Crown did in fact undertake to protect the treaty rights of the Athabasca Chipewyan First Nation and its exclusive use, occupation, and enjoyment of IR 201.

The source of the Crown's discretion and power can be traced back to 1763, when the Crown first took upon itself the responsibility of protecting Indians from exploitation by forbidding the direct sale of Indian lands to settlers. This historical duty is reflected in the *Royal Proclamation of 1763*; it entrenched and formalized the process by which only the Crown could obtain Indian lands through agreement or purchase from the Indians:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .

Prior to Confederation, the colonial government vested title to Indian lands in the Crown to protect against trespasses and encroachments by third parties. The rationale behind this protective measure was explained by the Nova Scotia Commissioner for Indian Affairs in 1846:

> Trespasses are committed upon the Indian reserves with the most daring impunity. I have made efforts to check the removal of timber from these lands, but the remoteness of their situation renders the task almost impossible. As the soil must be the foundation of every improvement, and the civilization of the tribe, it is necessary that these lands, and the timber upon them should be carefully protected.[154]

154 Nova Scotia, Legislative Assembly, *Journal* (1846), App. 24, 118, quoted in Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Law Library, 1990), 21.

After Confederation, section 91(24) of the *British North America Act, 1867*, vested exclusive legislative authority with respect to "Indians, and Lands reserved for the Indians" in the federal Crown. Legislation enacted by Parliament continued the protective responsibility of the Crown by including provisions that prohibited the alienation of reserve lands by Indian bands except upon surrender to the Crown. The fact that reserve lands are generally inalienable except to the Crown is still a main feature of the present *Indian Act*.

In *Guerin*, Dickson J found that the historical undertakings of the Crown and the *Indian Act* provided the source of a distinct fiduciary obligation on the part of the Crown to protect the Indians' interests in reserve land for their collective use and benefit:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the *Royal Proclamation of 1763* [see R.S.C. 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[155]

Further support for our finding that the Crown has undertaken a general responsibility to protect and to preserve Indian reserve land can be found in Justice Wilson's reasons in *Guerin*, which were consistent with those of Dickson J except to the extent that she held that the Crown's fiduciary obligation in relation to reserve land crystallized upon surrender into an express trust for the purposes specified in the surrender:

155 *Guerin v. The Queen*, [1984] 2 SCR 335 at 376.

> While I am in agreement that s. 18 does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves, I believe it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians . . .
>
> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think this is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s. 18 holds the land in trust for the Bands. The Bands do not have the fee in the lands, their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title, unless of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgment of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, *it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction*.[156]

In *Mitchell v. Peguis Indian Band*, Mr Justice La Forest also emphasized the importance of the Crown's historical undertaking to protect Indian lands:

> As is clear from the comments of the Chief Justice in *Guerin v. The Queen* . . . these legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. *The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use*; see the comments of Professor Slattery in his article "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at p. 753. The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserves.
>
> . . .
>
> [Since the *Royal Proclamation of 1763*], the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess

156 *Guerin v. R.*, [1984] 2 SCR 335 at 349-50, Wilson J. Emphasis added.

> Indians of their property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.[157]

Mr Justice La Forest not only acknowledges that the *Indian Act* is a codification of the Crown's historical undertaking to protect the Indians' interests in reserve lands from being eroded, but he also emphasizes the relationship between the treaty rights of Indians and the Crown's fiduciary duties. The fact that Indian people ceded their traditional homelands on the understanding that the Crown would protect them in the possession and use of their reserve lands is critical, because the expectation that the Crown will exercise its power or discretion to protect reserve lands may give rise to an enforceable fiduciary duty depending on the facts and circumstances.

In addition to the general undertakings of the Crown under the *Royal Proclamation* and the *Indian Act*, the evidence surrounding the negotiation of Treaty 8 and the allocation of land in the delta confirms that the Crown also made a specific undertaking to protect IR 201 and its rich wildlife and plant habitat for the collective use and benefit of the Athabasca Chipewyan First Nation. Since the interpretation of Treaty 8 is in issue, it is helpful to bear in mind the following interpretive principles summarized by the British Columbia Court of Appeal in *Claxton v. Saanichton Marina*:

a. The treaty should be given a fair, large and liberal construction in favour of the Indians;

b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;

c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;

d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;

e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.[158]

It is also important to consider the recent decision of the Court in *Delgamuukw v. R.*, where Chief Justice Lamer held that proper regard must be

157 *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 225-26 (SCC). Emphasis added.
158 *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 at 50 (BCCA).

given to the oral history and tradition of First Nations as evidence in the adjudication of cases dealing with aboriginal rights and Indian treaties:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 1 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[159]

The evidence before us demonstrates that countless generations of Chipewyan hunters, trappers, and fishermen have benefited from the rich resources of the Peace-Athabasca Delta. When the fur trade spread into the area in the late 1700s, the Chipewyan profited from the sale of their furs to traders competing for business in the delta. While the muskrat were the most bountiful fur-bearing species in the area, the Chipewyan also trapped mink, fox, coyotes, and other animals for profit, and there can be no doubt that they made a good living from trapping prior to entering into Treaty 8.

During the Treaty 8 negotiations, the Indians sought assurances from the Treaty Commissioners that they would not be confined to reserves and that they would be able to continue to earn a livelihood from hunting, fishing, and trapping. The Commissioners' report on the treaty negotiations confirmed that this was a critical issue, which had to be addressed before the Indians would agree to enter into the treaty:

> There was expressed at every point the fear that making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .

159 *Delgamuukw v. British Columbia* (1997), SCC File No. 23799 [unreported]. Also see *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 364 (CA), cited with approval in *R. v. Sioui*, [1990] 1 SCR 1025 at 1045, [1990] 3 CNLR 127 at 155, and *R. v. Sparrow*, [1990] 1 SCR 1075 at 1107, where the Ontario Court of Appeal held that where the interpretation of an Indian treaty is in question, the general principle is that the courts may consider the broad historical context of the treaty as an aid to determining the intention of the parties to the treaty:

> . . . cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

> We pointed out . . . that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting fears of the Indians for they admitted it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of Indians and were found necessary in order to protect the fish and fur bearing animals would be made, and they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*[160]

Accordingly, the written text of Treaty 8 states that Her Majesty the Queen promised the Indians the

> right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[161]

In addition to the right to hunt, fish, and trap, Treaty 8 also promised the establishment of Indian reserves:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individuals as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.[162]

In *R. v. Badger*, the Supreme Court of Canada relied on the Treaty Commissioners' statements to find that "for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element

160 *Treaty No. 8*, 6. Emphasis added.
161 *Treaty No. 8*, 12.
162 *Treaty No. 8*, 13.

which led to their signing the treaties."[163] This finding is of crucial importance in the case of the Athabasca Chipewyan because it is apparent that, when Chief Laviolette and his people adhered to Treaty 8, they had no intention of giving up their ability to earn a livelihood from trapping, fishing, and hunting. Although the treaty also provided for the setting aside of reserves, the following excerpt from a letter written by Treaty Commissioner McKenna to the Superintendent General of Indian Affairs on April 17, 1899, makes clear that the Indians were reluctant to be placed on reserves because they did not want to abandon their traditional ways of life and economies:

> From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary . . . it would appear that the Indians there act rather as individuals than as a nation . . . *They are averse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.*[164]

In the years following treaty, the Athabasca Chipewyan continued to prosper by exercising their treaty harvesting rights. It was not until large numbers of trappers from the south came into the area in the 1920s that the First Nation expressed any desire to have reserve land set aside for its benefit. Even then, the impetus for the selection and survey of reserve land was not for the purposes of settlement and agriculture but rather to preserve a large trapping, hunting, and fishing area in the delta for the First Nation's exclusive use and benefit. The fact that the land was not suitable for agriculture prompted Indian Agent Card to suggest that 4000 square miles, a much larger area than would normally be provided for under the terms of Treaty 8, "be set aside as a trapping reserve, and set aside for them, as from time immemorial, they have used it for this purpose. The Indians have no other way of making a living, constituted as they are, than by hunting and trapping."[165]

163 *R. v. Badger* (1996), 133 DLR (4th) 324 at 339 (SCC).
164 Commissioner James McKenna to Clifford Sifton, Superintendent General of Indian Affairs, April 17, 1899, NA RG 10, vol. 3848, file 75236-1, quoted in *Fort McKay Inquiry Report* (1996) 5 ICCP 23.
165 J. Card, Indian Agent, Fort Smith, NWT, to [Department of Indian Affairs, Ottawa], 5 July 1922, in NA, RG 10, vol 7778, file 27134-1.

Despite the repeated requests of Chief Laviolette and Agent Card for a reserve to be set aside for the band to protect its traditional way of life, no steps were taken to survey a reserve until 1931. In the meantime, the Alberta *Natural Resources Transfer Agreement, 1930* (*NRTA*), was enacted, which transferred administration and control over all unoccupied Crown lands from the federal government to the province of Alberta; therefore, any allocation of reserve land after 1930 would require provincial consent in terms of both the quantity (insofar as the land requested exceeded the band's minimum entitlement under treaty) and the location of the land to be set aside. Agent Card's request that 4000 square miles be set aside was not granted, but in 1935, federal and provincial officials agreed to set aside approximately 77.5 square miles of land (after deducting the water areas) for the Band as IR 201. The surveyor who set aside IR 201 stated that it was "without a doubt the best revenue producing tract in the north country, as it is a natural breeding ground for fur bearing animals and game birds, which afford both revenue and sustenance for this band of Indians. Thousands of muskrat are taken annually from the area between the East channel of the river and Fletcher Channel."[166]

The evidence is clear and unequivocal that both the Band and the government knew that IR 201 was selected specifically because its rich hunting and trapping would secure a stable source of income for members of the First Nation. To avoid any misunderstanding over the purpose for which IR 201 was set aside, the federal government requested that the provincial Order in Council transferring administration and control of the reserve to the Department of Indian Affairs expressly state that "these Indians are granted exclusive hunting and trapping privileges within the area" because "much of the area . . . is of no other commercial value."[167]

The elders' testimony and various historical sources confirm that pressure from non-Indian trappers in the 1920s and 1930s created in Chief Laviolette and Agent Card a sense of urgency to have set aside within the delta an extensive area of land as reserve over which members of the First Nation would have the exclusive right to hunt, fish, and trap. The evidence is clear that IR 201 was selected specifically because of its unique ecology and rich resources of game, muskrat, waterfowl, and fish. The elders of the First Nation provided consistent and uncontradicted testimony that hunting, trap-

166 H.W. Fairchild to Chief Surveyor, 4 November 1931, p. 2, and Fairchild to Secretary, Department of Indian Affairs, 16 December 1931, p. 3, in NA, RG 10, vol. 7778, file 27134-1.

167 Deputy Superintendent General H.W. McGill to John Harvie, Deputy Minister, Department of Lands and Mines, Edmonton, August 23, 1935, NA, RG 10, vol. 7778, file 27134-1.

ping, and fishing were essential to their livelihood and economy prior to and after the creation of IR 201. This was the dominant purpose for the selection and survey of IR 201.

Canada points out, however, that the Supreme Court of Canada held in *Badger* and *R. v. Horseman* that Article 12 of the *NRTA*[168] "evidenced a clear intention to extinguish the treaty protection of the right to hunt *commercially*," although the "right to hunt *for food* continued to be protected and had in fact been expanded by the *NRTA*."[169] Since the *NRTA* eliminated the treaty right to hunt, fish, and trap *commercially*, Canada's position correctly states that what "we are left with are treaty rights to hunt, fish and trap for food circumscribed with respect to both geography and regulatory authority."[170]

Although we do not dispute the accuracy of this position, the emphasis that Canada places on the limits of the treaty right to hunt, fish, and trap for food is entirely misleading because it fails to take into account the true nature and extent of the legal and economic interests of the First Nation that were affected by the dam. First, it should be borne in mind that the treaty right to hunt, trap, and fish for food is an important economic benefit in its own right. Deprived of the ability to exercise this right, members of the First Nation suffered hardship because they had to rely more heavily on store-bought goods rather than fish and game they caught themselves. Second, even though the treaty right to hunt, fish, and trap for commercial purposes had been extinguished by the *NRTA*, the fact remains that the provincial regulatory regime sanctioned commercial trapping and fishing, so the First Nation continued to rely heavily on the substantial income derived from trapping in and around IR 201 until the Bennett Dam virtually destroyed the ecology of the delta and the economy of the reserve. Furthermore, we cannot overemphasize that IR 201 was selected by the First Nation and set aside by Canada

168 *Natural Resources Transfer Agreement, 1930* (Constitution Act, 1930, Schedule 2), para. 12 states:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right which the Province hereby assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

169 It should also be noted that in *Horseman*, Mr Justice Cory recognized that it might be unfair to allow the unilateral extinguishment of the commercial right to hunt, but Parliament had the power to alter this important treaty right. He stated that, "although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the native people affected, nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case": *R. v. Horseman*, [1990] 1 SCR 901 at 933-36, [1990] 3 CNLR 95 at 104-6.

170 Submissions on Behalf of the Government of Canada, September 8, 1997, p. 27.

under the terms of Treaty 8 to protect the reserve as a hunting, fishing, and trapping area for the exclusive use and benefit of the First Nation. The harvesting of game and fish on the reserve was itself an exercise of the First Nation's treaty rights and the First Nation continued to harvest and sell furs and fish because this commercial activity was allowed by the provincial regulatory regime with respect to game and fish.

Based on the historical evidence before us in this inquiry, we make the following conclusions regarding the nature and content of the First Nation's treaty rights. First, the Crown's objective and purpose for entering into Treaty 8 was to extinguish Indian or aboriginal title to the treaty area and to open those lands for settlement, mining, lumbering, trading, or other purposes. At the same time, the federal Crown agreed to protect the Indian economies and ways of life, which were based upon hunting, trapping, and fishing in their traditional areas.

Second, the reason the First Nation adhered to Treaty 8 was to protect its rights to hunt, trap, and fish. Elders' testimony confirms that these rights were fundamental to the First Nation's culture, community, economy, and way of life. The Treaty Commissioners' strong assurances and guarantees that these rights would continue, and the promise of other benefits, were the inducements that ultimately persuaded the leaders of the day to sign the treaties.

Third, IR 201 was selected by the band because of its rich environment and abundance of muskrat, game, fish, and birds. Canada set aside IR 201 for the express purpose of providing the First Nation with exclusive rights to hunt, fish, and trap over this area and to protect the First Nation's ability to continue its traditional way of life and economy. This was justified by federal officials on the grounds that IR 201 had no other commercial value. Given the Crown's particular course of conduct in setting aside IR 201 for the exclusive use and benefit of the First Nation to assist it in exercising traditional pursuits, it was reasonable for the First Nation to expect that the Crown would take reasonable steps to protect the natural resources on IR 201 to ensure that its treaty rights and entitlements had meaningful content.

Although it is our view that the Crown provided a specific undertaking to the Athabasca Chipewyan First Nation to protect IR 201 for its exclusive use and benefit, we do not intend to suggest that the Crown was obligated to take positive steps to protect the First Nation's treaty rights and IR 201 from even the slightest encroachment by a third party. However, the facts in this case are so stark and the impacts on the First Nation so severe that we have no

difficulty in finding that the Crown had a duty to take reasonable steps to protect IR 201 from extensive environmental damage.

In light of the importance of the facts in this case, it is helpful to summarize our findings on the nature and extent of the damages to IR 201 at this point. In 1967, the Bennett Dam was completed and regulation of the Peace River began in the spring of 1968. Although the First Nation had not been given any advance notice of the dam or its effects on water levels in the delta, it was not long before the environmental ramifications of the dam became apparent. The federal government's awareness of the dam's adverse effects on the delta is confirmed in a July 17, 1970, memorandum, which stated that "*[d]amage to wildlife habitat in the vicinity of Lake Athabaska has been immediate and severe.*"[171] Three days later, the Deputy Minister of Indian Affairs confirmed that the treaty rights of the First Nation and its very economic livelihood had been seriously affected. The Deputy Minister confirmed that the "Indians and Metis in the Fort Chipewyan area previously derived between $100,000 to $250,000 a year from harvesting muskrat, ducks and geese in the Delta and Lake Athabasca, not to mention the commercial fishing activity."[172]

The elders' testimony on this point is unequivocal. Elder Madeline Marcel aptly expressed the repeated concerns of elders who had witnessed the decline of resources on IR 201:

> When the lake started drying out after the Bennett Dam was built, the muskrats declined. And when the muskrats declined, other fur bearing animals like the mink and everything else started to decline. And today there is hardly anything, nothing.[173]

Elder Daniel Marcel also informed the Commission that the First Nation's trapping heritage has all but disappeared:

> Since Bennett Dam came into effect we started losing water and without water there was no muskrat. I don't know what is going to happen in the future. I worry about that a lot. Because of the Bennett Dam, the lakes where we normally trap and harvest our muskrat were dried out. And when that happened there was nothing to trap and all those lakes, like the Frezie Lake behind their home, willows started to grow all

171 J. Austin, Deputy Minister, Energy, Mines, and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76). Emphasis added.

172 H.D. Robinson, Deputy Minister of Indian Affairs, to J. Austin, Deputy Minister of Energy, Mines, and Resources, July 20, 1970 (ICC Exhibit 1B, tab 12g, ICC p. 279). Emphasis added.

173 ICC Transcript, October 10, 1996, p. 35 (Madeline Marcel). Similar testimony was made by Daniel Marcel, Chief Cyprien, and other elders, as reviewed in the historical section of the report.

over the area. And if this goes on, in another few years there won't be any lake. And once there is no lake, there is nothing to trap.

And another area is north of Big Egg Lake. One time I remember there was about 20 trappers on that one lake trapping muskrat in the spring. Since the water start drying out, the lake start drying out, that lake dried out. *Today, I don't know where that lake is. It is just willows and just land now.*

When there were plenty of muskrats on Reserve 201, it was very easy for me to go and kill 100 muskrats a day. Today when I look at the Reserve 201, all the areas that I have trapped, I don't know if I will [be] able to kill even one muskrat . . . We used to live by killing muskrats. Now I don't know how those animals survive out there . . . After Bennet Dam was built, the Reserve 201 started drying up slowly year after year . . . As far as I know I am the only one that still tries to go out there now and then, but for almost nothing. There is nothing to trap out there. I still go out.[174]

The pictures of Egg Lake, taken around 1974 and in 1994, provide graphic evidence of what Elder Daniel Marcel meant when he said that he no longer knows where that lake is. Although it was once a rich area for muskrat trapping on IR 201, the marshy shores of Egg Lake have disappeared.[175]

Perhaps the most compelling and memorable words in this inquiry came from Elder Josephine Mercredi, who compared how life was before IR 201 dried out with how things are today:

When I used to trap with my husband on Reserve #201 there was a lot of water and because of a lot of water, we had a lot of muskrat. And I used to walk back in the sloughs and I set traps along the small sloughs where white men didn't bother with because they were looking for bigger areas. But I trapped in those smaller areas and there were lots of muskrats. I ran my traps in the morning and picked up muskrats off the trap. And I went back in the evening and there were the same amount again taken. So I looked at the traps twice a day and I got muskrats both times.

174 ICC Transcript, October 10, 1996, pp. 56-58 (Daniel Marcel).

175 These pictures are reproduced from the *Northern Rivers Basin Study*, which provided the following caption and description at page 23 of the report:

**Then and Now:** Egg Lake is one of the perched basins of the Peace-Athabasca Delta that is only replenished by periodic overland flooding. Its marshy shores were once a focal point for fur trappers and a haven for waterfowl. In fact, this lake once set the Hudson's Bay Company standard for high quality muskrat pelts. In the absence of these floods over the last two decades, Egg Lake is being transformed into a terrestrial ecosystem marked by grasses and willows.

courtesy of R. Fuller

Egg Lake, circa 1974

courtesy of Vic Peck

Egg Lake, circa 1994

> Today if people have to go back to set their traps on Reserve #201, there would be nothing in the traps for them to pick, maybe because there is no water. Without water, there are no muskrats. There is, where lakes were where I had traps in years back, there is only willows and grass and just a dense bush now in many of those little lakes . . .
>
> *Today you go on Reserve, you look, you listen for the sounds of birds, waterfowl, ducks, geese. You don't hear anything anymore.*[176]

It is telling that only some members of the band actually lived on IR 201 when it was a prime area for trapping, yet many other members who lived off the reserve at locations like Jackfish Lake would move to the reserve in March of every year for the muskrat trapping season.[177] The primary purpose of the reserve was not to serve residential needs but to provide an economic livelihood for people who had few alternative means of income. Today, only a few people go back to the reserve, and it no longer has any real value to the First Nation because of the massive decline in muskrat habitat and other fur-bearing populations on IR 201.[178]

Legal counsel for the First Nation summarized the impacts on the reserve and the First Nation in these terms:

> The use and benefit for which Reserve #201 was selected has been eradicated. As Chief Cyprien testified, it no longer has any value for trapping and hunting. "There are no muskrats, no water . . . and no other animals which feed off the muskrats." ACFN members still go to the Reserve because it has historical and spiritual value for them. It has no economic value and the number of muskrats and other animals are so small that only Daniel Marcel goes there from time to time for the purposes of hunting and trapping. It is not possible for ACFN members to effectively exercise their treaty rights in other parts of the Delta, because the whole Delta has been affected by the Bennett Dam.
>
> The use and benefit of Reserve #201 has been *de facto* expropriated by the withholding of water from the Peace River and the Delta as the result of the operation of the Bennett Dam . . . As the elders testified at the community session, many of the lakes in Reserve #201 have dried up and lakes and waterways which were formerly used as a transportation route and for habitat for fish, birds, and water fowl, have dried up, rendering the land unusable.[179]

In our view, the First Nation's submissions are compelling, particularly because the intentions of the First Nation in selecting IR 201 and of Canada

176 ICC Transcript, October 10, 1996, pp. 51-52 (Josephine Mercredi).
177 See elders' testimony in ICC Transcript, October 10, 1996, pp. 46-56.
178 See Chief Cyprien's testimony, ICC Transcript, November 27, 1996, pp. 168-69.
179 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 55

in setting it aside as an exclusive hunting, fishing, and trapping area for the First Nation have been almost entirely frustrated by the ecological destruction of the delta. It is clear to us that the ostensible value of the First Nation's treaty rights to hunt, trap, and fish for food was diminished to the point that the value of these rights in respect of its reserve lands has become practically non-existent. The construction and operation of the Bennett Dam substantially interfered with the First Nation's use and benefit of IR 201 and its treaty rights to hunt, fish, and trap for food. As is glaringly apparent from the evidence in this case, it is more than the First Nation's treaty rights to hunt, fish, and trap for food that have been affected; the First Nation's very way of life and its economic lifeblood were substantially damaged as the Government of Canada, armed with full knowledge of the ecological destruction that would ensue, did nothing.

To focus, as Canada has suggested, only on the treaty rights of the First Nation to hunt, fish, and trap for food is too narrow and excludes other legitimate uses of IR 201. The fact of the matter is that the Bennett Dam substantially diminished the First Nation's beneficial use of IR 201 and its ability to earn a livelihood from commercial trapping. Even though the ability to earn a livelihood is not, strictly speaking, a treaty right, the harvesting of muskrats and other fur-bearing animals took place largely on the reserve itself, and the sale of furs was allowed by the provincial regulatory regime respecting game.

In our view, no reasonable interpretation of Treaty 8 could allow either the Government of Canada or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based. Nor do we believe that a reasonable interpretation of Treaty 8 would allow any government to effectively destroy the very economies upon which the Indians' signature of Treaty 8 was premised. Even if we are incorrect in these two conclusions, it is surely clear that no reasonable interpretation of Treaty 8 would allow the substantial interference with treaty rights *on reserve land* set aside by Canada specifically as an exclusive hunting, fishing, and trapping area for the use and benefit of the First Nation. Despite the Crown's undertaking to protect these lands for the exclusive use of the First Nation, the construction and operation of the Bennett Dam deprived the First Nation of the beneficial use of its treaty entitlement.

The inequity of the result is dramatic. The federal Crown's right to take up lands for settlement and other purposes has certainly been exercised in the

Treaty 8 area. The First Nations have honoured their part of the treaty, and the Crown has received the benefits of that treaty in the form of lands and resources worth untold millions of dollars. Yet the consideration received by the First Nation under Treaty 8, namely, the right to hunt, trap, and fish and the exclusive right to the beneficial use of a mere 77 square miles of land in IR 201, has been rendered almost entirely valueless because of the ecological destruction of those lands – a consequence the Government of Canada could have prevented, but chose not to.

For the above reasons, we have no hesitation in concluding that members of the Athabasca Chipewyan First Nation suffered extreme hardship and economic loss as a result of the destruction of the delta and environmental damages to IR 201. Given the severity of the impact on this community, it is our view that members of this First Nation were and are entitled to expect the Crown to take reasonable steps to prevent, to mitigate, or to seek full compensation for the destruction of the First Nation's economic livelihood, for damages to IR 201, and for the substantial infringement on its food harvesting rights under Treaty 8. Although the duty to take reasonable steps to protect IR 201 or to seek compensation is not expressly provided for in the treaty, we find the reasoning of La Forest J in *Mitchell v. Peguis Indian Band* compelling in this regard:

> It would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted . . . to diminish in significant measure the ostensible value of the rights conferred.[180]

The purpose for which IR 201 was selected and the First Nation's beneficial interest in the reserve were based on the continued ability to hunt, trap, and fish. The extensive infringement on these treaty rights and entitlements has essentially deprived the First Nation of a large measure of the benefits and consideration provided for under the terms of Treaty 8. It is for this reason that members of the First Nation are, at the very least, entitled to compensation for its damages. To suggest otherwise would run afoul of this oft-quoted principle from *Sparrow*:

> This court found [in *Guerin*] that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a

180 *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 (SCC) at 230.





> fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams*[181], ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[182]

Counsel for the First Nation suggested that the common thread running through the case law is the notion that the Crown has a fiduciary duty to protect reserve lands for the benefit of Indians:

> A broad and purposive view of the Crown's fiduciary obligations to preserve and protect the Indians' interest in reserve lands is a thread which runs through all judicial considerations of the issue. The overriding consideration which will inform the specific fiduciary duties will be the preservation of the Indians' interest in the use and benefit of the lands. The exercise of Indian hunting, fishing, and trapping rights are intrinsic to the [Athabasca Chipewyan First Nation's] use and benefit of the reserve land. Whether the threat to the interest is direct dispossession, such as in the case of a surrender, or indirect loss, such as through collection remedies available against non-Indian interests or loss of use by reason of environmental damage, the resultant loss of use and benefit of the land is the fundamental issue.[183]

We agree. The thrust of the cases reviewed by the Commission emphasizes the fiduciary relationship between the Crown and aboriginal peoples and the historical undertaking of the Crown to protect the Indian interest in land. This undertaking is reflected in the *Royal Proclamation of 1763*, the *Indian Act*, and in the solemn promises contained in the treaties between the Crown and aboriginal peoples. To use the language of Justice La Forest in *Hodgkinson*, the broad scope and power assumed by the Government of Canada with respect to Indians and reserve lands confirm the existence of a power-dependency relationship between the Crown and First Nations and a reasonable expectation that the Crown would protect and preserve reserve land for the use and benefit of the First Nation. This is further reinforced in this case by the specific nature of the relationship and treaty promises between the Crown and the First Nation.

We are, of course, aware of the Crown's arguments that, although the First Nation may be entitled to recover damages for nuisance, trespass, or interfer-

181 *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227, 34 OR (2d) 360 (CA).
182 *R. v. Sparrow* (1990), 70 DLR (4th) 385 at 408 (SCC).
183 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 66.

ence with its treaty rights, such damages are recoverable from those persons or entities who were responsible for the damages, not the federal Crown. However, our finding that the Crown had a duty to take reasonable steps to prevent, to mitigate, or to seek compensation for damages to IR 201 and the First Nation's treaty rights caused by a third party is reinforced by the fact that the Crown had scope for the unilateral exercise of a power or discretion affecting its reserve lands and treaty rights. This takes us into the second branch of our three-stage analysis.

### *Unilateral Discretion or Power Affecting the First Nation's Legal or Practical Interests*

In *Apsassin*, McLachlin J held that the Crown must have some unilateral discretion or power it can exercise with respect to the First Nation's legal or practical interests before a fiduciary duty will be imposed by the courts. The First Nation submits that the *Indian Act* as a whole confers on the Crown unimpeded control with respect to the management of reserve lands, which in itself established a general fiduciary duty on the part of the Crown. In addition to section 18(1) of the *Indian Act*, there are a number of other provisions that clothe the Minister of Indian Affairs or the Governor in Council (i.e., the federal cabinet) with substantial scope and power with respect to the management and development of reserve land.[184] Nor are the Crown's fiduciary obligations simply confined to surrendered lands; they extend to *unsurrendered* reserve lands, the title to which is vested in the Crown for the collective use and benefit of an Indian band.

Although counsel for the First Nation acknowledged that the Crown can narrow the scope of its fiduciary duties with respect to reserve lands, counsel asserted that this narrowing can only be accomplished through the express devolution of the Crown's powers over reserve lands to the band pursuant to section 60 of the *Indian Act*:

> **60.(1)** The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

184 Various provisions under the *Indian Act* confer broad power and discretion in the federal Crown over the management and protection of Indian reserve land. For example, see sections 20 (possession of lands in reserve); 28 (Ministerial permits for use and occupation); 29 (exemption from seizure); 30 (penalty for trespass); 34 (authority of superintendent and Minister re: maintenance of roads, bridges, etc.); 35 (lands taken for public purposes); 37 (surrenders and designations); 58 (uncultivated or unused lands); and 93 (removal of material from reserves).

(2) The Governor in Council may at any time withdraw from a band right conferred on the band under subsection (1).

Even this authority, it is argued, must be exercised with due regard to the Crown's fiduciary duty to ensure that "the First Nation had the requisite knowledge, expertise, financial and technical resources to properly manage the administration of the reserve."[185] According to counsel for the First Nation, it is notable that, on the facts before us, the First Nation has never made such a request for control and management of its reserve lands. And, since an Indian agent was maintained at Fort Chipewyan until the mid 1970s, the Crown apparently did not consider it desirable to confer such a right upon the band.

Canada contends that the Crown did not have unilateral power or discretion to protect and preserve the First Nation's reserve lands and treaty rights in this case because the *Indian Act* did not preclude the First Nation from commencing legal proceedings against BC Hydro for environmental damages to the reserve. Therefore, Canada submits that the First Nation had sufficient power to seek the appropriate remedy on its own, which it did by initiating legal proceedings in 1970.

As a starting point, it is important to recognize that the Crown's fiduciary obligations are not absolute and can be narrowed on the facts of any given case. In *Guerin*, Dickson J confirmed that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion vis-a-vis the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary."[186] For instance, the Crown's discretion under section 18(1) of the *Indian Act* can be narrowed by the terms of any treaty, surrender, or other provisions of the *Indian Act*. Therefore, it is necessary to examine carefully the applicable statutory provisions, the nature of the relationship between the First Nation and the Crown, the extent of the Crown's power and discretion over matters affecting the First Nation's legal or practical interests, and, finally, the extent to which the First Nation exercises its own autonomy over decisions affecting its interests.

Looking at the statutory scheme under the *Indian Act*, it is clear that the Act provides the Minister of Indian Affairs and the Governor in Council with extensive powers over the management and development of reserve land.

185 Submissions on Behalf of Athabasca Chipewyan First Nation, June 1997, p. 74.
186 *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1985] 1 CNLR 120 at 139.

Section 18(1) in particular confers a broad discretion on the Governor in Council to determine whether any use of reserve land is for the benefit of an Indian band. The difficulty in this case is that sections 18 and 31 of the *Indian Act* do not give the Crown any unilateral power to prevent third parties from damaging reserve lands. Accordingly, Canada asserts that the First Nation was "never precluded in law from taking legal action against the Province of British Columbia or B.C. Hydro whether under s. 31 of the *Indian Act* of 1952 for trespass or in nuisance."[187]

Although it could be said that the First Nation exercised a measure of autonomy with respect to decisions affecting its interest in IR 201, Canada also had the scope to exercise some of its powers under the Act in a unilateral fashion. For instance, the Crown had the authority to initiate trespass proceedings on behalf of the First Nation (assuming that the facts support an action in trespass) and presumably was entitled to protect the First Nation's interests and the Crown's title in the reserve by initiating a legal action in nuisance. However that may be, it strikes us as patently unreasonable for Canada to assert that it had no obligation to do anything to protect IR 201 from damages caused by the Bennett Dam simply because the First Nation was in a position to seek the appropriate legal remedy (which it indeed sought, albeit unsuccessfully because it apparently lacked the resources to pursue the matter).

In our view, Canada's narrow interpretation of its fiduciary obligations is not consistent with the honour of the Crown and the tenor of its promises under the terms of Treaty 8. In light of the severity of the impact on the band's treaty rights and interest in IR 201, we find that the particular facts and circumstances in this case triggered the Crown's fiduciary duty to take reasonable steps to protect the band's reserve land from degradation caused by the construction and operation of the Bennett Dam. While we take Canada's point that the First Nation was not precluded from initiating its own legal proceedings, the devastating impacts of the dam on the First Nation's treaty rights and interest in IR 201 demanded that the Crown take some action to protect the First Nation's interests and to prevent the destruction of its way of life and livelihood. The fact that the First Nation did not have the resources to pursue the action against BC Hydro demonstrates its vulnerability under the circumstances. Although the Crown knew at least as early as 1959 that the dam might have significant hydrological and ecological effects

187 Submissions on Behalf of the Government of Canada, September 8, 1997, p. 23.

on the delta and IR 201, it did nothing to prevent the First Nation from harm. The Crown did not even inform the First Nation of the Peace River project and its potential adverse effects on the delta. Although there was precedent for the Crown to study and assess the potential impact of hydro projects – since it had done so in relation to the Columbia and Kootenay Rivers – it made little effort to review the effects of the enormous Bennett Dam project on one of the most ecologically sensitive areas on the continent. It simply defies belief that nothing was done to address these concerns before it was too late.

The Crown's reply to the First Nation's assertions that it had a fiduciary duty to protect IR 201 is simply that it did not have any unilateral power or discretion to intervene in the Peace River power development project to prevent or to mitigate damages caused to the reserve. We disagree. It is our view that, on the specific facts of this case, the Crown had significant power and discretion at its disposal, pursuant to its regulatory authority under the *Navigable Waters Protection Act* (*NWPA*), with respect to the construction and operation of the Bennett Dam. This regulatory authority, in turn, gave the Crown a broad discretion to protect interests that fall within the exclusive legislative authority of the federal Crown. Furthermore, the Crown's regulatory authority and discretion to protect other matters of federal interest could, in fact, be exercised in a unilateral manner, whereas the First Nation did not have such powers or discretion at its disposal.

The 1956 amendments to the *Navigable Waters Protection Act* provided the federal Minister of Public Works with the following authority:

> 4.(1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless
> (a) the site and plans thereof have been approved by the Minister;
> (b) the work is built, placed and maintained in accordance with the plans and the regulations.
> (2) This section does not apply to any work, other than a bridge, boom, dam, abolteau or causeway, if in the opinion of the Minister
> (a) the work does not interfere substantially with navigation, and
> (b) the value of the work does not exceed five thousand dollars.[188]

If a work was built or placed upon a site that had not been approved in advance by the Minister of Public Works, or if it was not maintained in accordance with the approved plans and regulations, section 5(1) of the *NWPA*

188 *Navigable Waters Protection Act*, RSC 1952, c. 193, as amended by SC 1956, c. 41.

gave the Minister of Public Works the legislative power to remove and destroy the work.[189] Section 5(2) also gave the Minister the authority to approve a project after construction had commenced. The 1969 amendments to the *NWPA* are similar to the 1956 version, since they also require the approval of works, including dams, and provide the Minister of Public Works with a broad remedial power to order the owner to remove or to alter a work built without prior approval or not maintained in accordance with pre-approved plans and regulations.[190]

A thorough consideration of the facts, the provisions of the *NWPA*, and the relevant case law on this subject leads us to conclude that the *NWPA* applied to the Bennett Dam, and a licence was required by BC Hydro for the construction and operation of the dam. Indeed, the federal Crown was also of the opinion that the *NWPA* applied at all material times, as evidenced by the 1970 memorandum of the Deputy Minister of Energy, Mines, and Resources:

> Bennett Dam was licensed in 1962 by the Comptroller of Water Rights of British Columbia. Advised by Public Works that a federal permit was required under the *Navigable Waters Protection Act*, the province refused to make application on the ground that the Peace River was not considered navigable at the dam site. Public works referred the matter to the Department of Justice which opined that the Act did apply. *Public Works decided not to press the province, although a memo dated April 18, 1967 by the Deputy Minister of that Department to his Minister indicates that the dam is considered illegal.*[191]

Other government correspondence confirms that the Deputy Minister of Public Works, Major-General H.A. Young, "reminded" the province in 1962 that a federal permit was required under the *NWPA*.[192] The Chairman of BC

189 Section 5(1) of the 1956 *Navigable Waters Protection Act* states:

> 5. (1) Any work to which this Part applies that is built or placed upon a site not approved by the Governor in Council, or is not built or placed in accordance with plans so approved, or having been so built or placed, is not maintained in accordance with such plans and the regulations, *may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works*, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of the work, deducting therefrom any sum that may be realized by sale or otherwise, are recoverable with costs in the name of Her Majesty from the owner. [Emphasis added.]

190 In 1969, the relevant sections of the *NWPA* were amended to read as follows:

> 4.(1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless
>
> (a) the work and the site and plans thereof have been approved by the Minister upon such terms and conditions as he deems fit prior to commencement of construction . . . .
>
> (2) This section does not apply to any work, other than a bridge, boom, dam or causeway if, in the opinion of the Minister, the work does not interfere substantially with navigation.

191 J. Austin, Deputy Minister, Energy, Mines, and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab 12F, ICC pp. 275-76).

192 SC 1956, c. 41.

Hydro responded in 1962 by asserting that no licence was required because the Peace River was not navigable "*at the dam site*." This assertion is specious, since principles of common law clearly establish that navigability is not determined by reference to the site of the proposed work only; rather, the whole water body must be looked at to determine whether that body of water is in fact navigable.[193] This point was made in *Friends of the Oldman River Society v. Canada*,[194] where the Supreme Court of Canada held that the regulation of navigable waters must be viewed functionally as an integrated whole to ensure that projects which obstructed navigation at one point in a navigable water were considered in respect of impacts on navigability at another point along a navigational system. Justice La Forest, writing for the majority, also held that the Act applied to the provincial Crown:

> Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, *it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.*[195]

In determining whether a water is navigable, the "rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists."[196]

---

193 See, for instance, *International Minerals & Chemicals Corp. (Canada) Ltd. v. Canada (Minister of Transport)* (1992), 58 FTR 302 at 310-13 (FCTD); *Coleman v. Ontario (Attorney General)* (1983), 27 RPR107 at 113, 119 (Ont. HC); *Stephens and Mathias v. MacMillan et al.*, [1954] OR 133 at 140-45; *Quebec (Attorney General) v. Fraser* (1906), 37 SCR 577 at 594, 597.

194 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 (SCC).

195 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 39 (SCC). Emphasis added. La Forest J also held that the federal Crown has jurisdiction over navigation both by virtue of the "ancient common law public right of navigation" and the constitutional authority over the subject matter expressed under section 91(10) of the *Constitution Act, 1867* which assigns exclusive legislative authority over "Navigation and Shipping" to the federal Parliament. La Forest J held that the provincial Crown, and any grantee of the provincial Crown, were bound by the *NWPA* in constructing the Oldman dam and that any proprietary right which the province of Alberta may have had in relation to the bed of a river was still subject to the exclusive legislative jurisdiction of Parliament:

> Neither the Crown nor the a [sic] grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament (at 38).

196 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 34 (SCC).

It is clear that many locations along the Peace River and throughout the Peace-Athabasca Delta were navigable. Therefore, a permit was required for the Bennett Dam. The report conducted by the federal government in 1962, entitled "The Effect of Regulation of the Peace River," emphasized the importance of navigation on the Peace-Athabasca river system for trade and commerce and concluded that the dam "will materially affect the regimen of the Peace River and thus the Slave River, Great Slave Lake and the Mackenzie River." Even though the report stated that it was not obvious whether the dam project would be detrimental to navigation, and that "any detrimental effect would probably be most serious during the filling of the reservoir," the Water Resources Branch obviously considered the Peace River and the delta area to be navigable.[197]

We also reject Canada's assertions that the *NWPA* did not apply to the Bennett Dam on the grounds that the evidence was equivocal on whether the regulation of the Peace River would interfere with navigation. Whether an actual adverse impact on navigation was anticipated is immaterial, because the *NWPA* provides that the requirement for approval by the Minister applies to *all dams constructed on navigable waters*. Section 4(2) of the 1956 Act states that the Minister's approval is not required for any work, *other than a dam*, if the Minister is of the opinion that it will not interfere substantially with navigation. The wording of section 4(2) in the 1969 *NWPA* is essentially the same. In any event, the evidence is clear that Canada was aware that construction and operation of the dam would have an impact on navigation even if there was some question about how extensive such impacts would be and whether they would be positive or negative in the long term. Therefore, we find that, because the Peace River was navigable and the work involved a dam which impacted on navigation, section 4 of the *NWPA* required that the site and plans for the Bennett Dam be approved in advance by the Minister of Public Works and that the dam be operated in accordance with the plans and regulations. Because the construction and operation of the dam was never approved, the Minister of Public Works had the remedial power to remove or to destroy the work, or, alternatively, to approve the project after its completion. While it is extremely unlikely that the Minister of Public Works would have seriously entertained the use of this draconian power, the fact remains that Canada had considerable leverage to intervene in the construction and the operation of the dam because it had an express statutory power to do so.

197 Department of Northern Affairs and National Resources, Water Resources Branch, "The Effect of Regulation of the Peace River, Interim Report No. 1," June 1962 (ICC Exhibit 1A, tab 3, ICC p. 56).

Since the federal Crown had regulatory authority under the *NWPA* at all relevant times, it remains to be considered whether the Crown had the discretion to exercise this power in a manner that allowed the Crown to protect other federal interests, including the First Nation's interest in IR 201. Counsel for Canada submitted that any exercise of the authority under the *NWPA* for purposes not related to navigation and shipping would be improper:

> [T]he *NWP Act* does not provide the Minister of Transport with the authority to prevent works for other reasons such as impacts on surrounding lands. It is submitted that to attempt to exercise such authority would amount to the exercise of a discretionary power on the basis of considerations irrelevant to the purposes of the *NWP Act*. Courts have the authority to judicially review and quash such improper exercises of discretionary power. The *NWP Act* is aimed at protecting navigable waters and regulating works which impair *navigability*, it is not aimed at protecting land from the effects that the works may have on land . . . The *NWP Act* was not meant as a general purpose environmental protection statute and, it is submitted, could not have been used as one.[198]

Essentially the same argument was considered in the *Friends of the Oldman River Society* and rejected by Mr Justice La Forest on this basis:

> If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. *It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.*
>
> *It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land.* However that may be, the *Guidelines Order* now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5.[199]

La Forest J not only found that it is appropriate for the Minister responsible for the *NWPA* to consider the environmental impacts of a work on other federal areas of jurisdiction, such as Indians and reserve lands, fisheries, and national parks, but he clearly alluded to the fact that the federal Crown has

198 Submissions on Behalf of the Government of Canada, September 8, 1997, p. 30. Emphasis in original.
199 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 23-24 (SCC). Emphasis added.

always had the authority to consider environmental impacts on federal interests, even before the advent of environmental screening and assessment procedures pursuant to the *Environmental Assessment Guidelines Order* in 1984 and the enactment of the *Environmental Assessment Act* in 1994. This result is consistent with La Forest J's finding that Parliament has legislative jurisdiction respecting environmental matters, at least to the extent that it relates to the exercise of power over specific heads of jurisdiction, such as Indians and Indian lands, fisheries, navigable waters, and national parks.

Finally, it is important to observe that La Forest J held that the Minister of Transport had an "affirmative regulatory duty" because the *NWPA* provides for a "legislatively entrenched regulatory scheme . . . in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water."[200] Although the Court considered a more recent version of the Act, the view that the Crown had a positive duty to exercise its regulatory authority under the *NWPA* is supported by the reasoning of the Privy Council in *Province of Bombay v. City of Bombay*, cited with approval by La Forest J in *Friends of the Oldman River Society*:

> If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.[201]

In view of La Forest J's finding that the public right of navigation is paramount and takes precedence over the rights of the owner of a water bed, even when the owner is the Crown, it stands to reason that the object of the *NWPA* can only be fulfilled if the responsible Minister has a positive duty to exercise the regulatory authority conferred on him or her by Parliament.

Therefore, we find that the federal Crown had the power at all material times to consider whether the Bennett Dam would impact on federal interests, including Indians and Indian lands, under section 91(24) of the *Constitution Act, 1867*. We also find that the federal Crown had an affirmative duty to exercise its regulatory authority and, in the course of deciding whether to approve the dam project, the Crown had the discretion to consider whether the dam's construction would impact on federal areas of inter-

200 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 30 (SCC).
201 *Province of Bombay v. City of Bombay*, [1947] AC 58 at 63, cited with approval in *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 32 (SCC).

est, including the First Nation's treaty rights and interests in IR 201. To read the legislative and constitutional jurisdiction of the Crown in a more limited fashion would frustrate the purpose of the Act, which, in its essence, is and was a tool to regulate navigation and to protect riparian owners from the harmful effects of works constructed on navigable waterways. Even though there was no express wording binding the provincial Crown under the *NWPA*, the Act by necessary implication bound the provincial Crown, which was required to receive approval of any works that could interfere with navigation.[202]

In view of the findings above, we conclude that the Crown had a duty to act and broad scope for the unilateral exercise of power or discretion. It is also clear that Canada's decision not to exercise its power and discretion impacted significantly on the First Nation's legal and practical interests. We shall now address the third, and final, stage of the analytical approach outlined in *Frame v. Smith*.

### *First Nation Is Peculiarly Vulnerable to or at the Mercy of the Fiduciary*

The Commission finds that the First Nation was, in fact, peculiarly vulnerable to the Crown's unilateral power and discretion to regulate the construction and operation of the Bennett Dam. The federal government was well aware of the hydroelectric development plans of British Columbia on the Peace River prior to the completion of the dam. Following Premier Bennett's public announcement of his government's intentions to construct the dam in 1957, the Peace River hydroelectric development project became a high-profile issue of the day. It is apparent from the many books and articles written on Premier Bennett's vision to develop the Peace River that there was also a political dimension to the project which took priority over discussions that had been ongoing for years among British Columbia, Canada, and the United States to develop the hydro potential of the Columbia River. With the establishment of BC Hydro in 1962, Premier Bennett sought to ensure that British Columbia would be the primary benefactor of the immense wealth that Bennett Dam would generate.[203] It is clear that the Crown knew very early that,

202 *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 at 38 (SCC).

203 At the time, Premier Bennett explained why establishment of the BC Hydro and Power Authority was necessary: "Because the federal government has refused to act in giving B.C. a fair return of the taxes paid by power corporations, it is this government's policy to have basically all electric power and energy that is supplied to the public under public auspices," quoted in Earl K. Pollon and Shirlee Smith Matheson, *This Was Our Valley* (Calgary: Detselig Enterprises, 1989), 196.

given the magnitude of this project, the regulation of the Peace River was likely to have significant effects downstream. In fact, the historical record confirms that the federal Crown had undertaken a study in 1959 through the Water Resources Branch to determine what effect the dam might have on navigation.

The First Nation was peculiarly vulnerable to the Crown's discretion and power because it did not have knowledge of any real or potential effects of the dam. Notably absent in the facts before the Commission is any evidence that representatives of the government of Canada or of British Columbia consulted with the Athabasca Chipewyan First Nation, or informed its members that the ecology, flora, and fauna of the delta could be significantly altered by the Bennett Dam. Nor was the First Nation given an opportunity to provide input into the planning and development of the Bennett Dam. It was only when the water flow on the Peace River was cut off to fill the reservoir in 1968 that members of the Band began to realize that a structure built 650 kilometres away would have significant implications on their lives and the land.

The delta began to dry out, and by 1970 Canada acknowledged that the impacts on wildlife habitats "were immediate and severe." Still, it took the efforts of a group of scientists, acting on their own initiative, as well as those of the Premier of Alberta, to draw the concerns of the aboriginal residents of the delta area into critical focus for the federal government. On July 2, 1970, Alberta Premier Harry Strom wrote to Prime Minister Trudeau expressing his concerns in relation to the growing controversy over the Bennett Dam. His letter is worth repeating:

> In addition to the observed disbenefits to the trapping industry, and the anticipated adverse results to the commercial fishing industry over the entire lake, affecting the livelihood of 1,500 people, a wildlife habitat of 1,000 square miles is being subjected to drastic change. Although it is difficult to predict at this time what the final outcome of this change might be, indications are that Canada will lose one of the most significant natural ecological environments to be found anywhere on the North American Continent.
>
> The widespread ramifications of the situation have given Alberta cause for concern. However, the problem is not of Alberta's making. The majority of the affected area is under Federal jurisdiction, and the ramifications of the problem, as well as its cause, have national implications. Therefore, the Government of Alberta contends that the Government of Canada has a responsibility and an obligation to rectify the present

> situation. I am sure you will agree only Canada can be held responsible for any detrimental effects that may accrue in the future.[204]

Aside from a few feeble attempts to invite British Columbia or BC Hydro to participate in joint discussions to determine how to address environmental impacts on the delta, Canada did not exercise its regulatory authority to ensure that federal interests were protected.

Canada either knew, or ought to have known, of the impacts the dam would have on the economy and way of life of the First Nation, and this information should have been disclosed to the First Nation at the earliest possible opportunity. Canada's failure to provide timely disclosure of the dam and the impending damages to the delta amplified the effects of the First Nation's vulnerability, because it was deprived of the opportunity to make representations to BC Hydro or to seek whatever recourse was available to try to prevent or to mitigate the damages.

It is significant that an Indian Agent continued to administer most of the First Nation's affairs until he retired around 1973. As the Minister of Indian Affairs' field representatives, Indian Agents were responsible for a broad range of matters related to band affairs. The Indian Agent assisted the band council in administering its affairs, drafted band council resolutions and by-laws, and attended to some of the most basic needs of the community, including the distribution of social assistance to those members that needed it.[205]

An action was commenced in 1970 by the First Nation and a number of other plaintiffs against BC Hydro, but it should be recalled that the First Nation still had limited control over its own administration and affairs. The First Nation did not have funding at this time to pursue legal actions to protect reserve lands, and it had very limited resources to challenge BC Hydro and the Province of British Columbia with respect to a project of this magnitude. The technical nature of the evidence demonstrates that the First Nation would have required considerable resources to obtain and produce the information, technical data, studies, and evidence necessary to prove its case in a court of law. The Crown not only had knowledge of the dam and its potential consequences but had virtually unlimited resources to study its effects on the hydrology and ecology of the delta, to force BC Hydro to comply with its

204 John A. MacDonald, Deputy Minister, Public Works, to J. Austin, Deputy Minister, Energy, Mines, and Resources, Ottawa, August 14, 1970 (ICC Exhibit 1B, tab 12N, ICC pp. 271-72).

205 For instance, see testimony of Chief Tony Mercredi, ICC Transcript, November 27, 1996, pp. 122-27, and Lawrence Courtoreille, member of the Mikisew Cree First Nation, p. 128.

regulatory authority under the *NWPA*, and to take whatever measures it considered necessary to prevent or to mitigate the dam's effects on the delta. Although, following a careful analysis and consideration of the available options, Canada might have decided that the broader public interest must prevail over the preservation and maintenance of the delta's ecology, we are nevertheless of the view that Canada should have taken the necessary steps to ensure that the First Nation received adequate compensation for the damages caused to IR 201, the exercise of its treaty rights, and the destruction of its economic livelihood.

Accordingly, we find that the First Nation was peculiarly vulnerable to the exercise of the federal Crown's unilateral power and discretion. It was the Crown that had regulatory authority with respect to the dam's construction and operation, not the First Nation. Furthermore, the Crown had the resources and the influence to prevent, to mitigate, or to seek compensation for damages caused to IR 201. Why the Crown chose not to exercise its authority over the Bennett Dam, while members of the First Nation suffered undue hardship, is perplexing, given the nature of the Crown's fiduciary relationship with aboriginal peoples and its treaty commitments.

### *Standard of Care and Breach of Fiduciary Duty*

For the reasons stated above, we find that the Crown owed a fiduciary duty to the First Nation to prevent, to mitigate, or to seek compensation for damages to IR 201 caused by the dam. Since the nature of the Crown's fiduciary relationship with First Nations has been described by the courts as *sui generis*, the standard of care the Crown is required to meet in each case will vary, depending on the particular facts and circumstances. In cases involving the management of trust moneys or surrendered lands, the case law suggests that the standard of care is an onerous one because the nature of the duty is analogous to that required of a trustee.[206] In cases such as *Sparrow*, where the issue in question relates to the enactment of legislation or an exercise of regulatory power that infringes upon existing aboriginal or treaty rights, the duty is not one of undivided loyalty to the First Nation, since other interests must be balanced against the aboriginal or treaty right in question; rather, the duty is to ensure that the legislation or regulation meets a rigid standard of justification to minimize the impairment on the exercise of such rights.

206 For instance, in *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J held that the Crown breached its fiduciary duty and that "[e]quity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal."

In the case before us, we agree with counsel for the First Nation that the appropriate standard of care is based on what a person of ordinary prudence would do in managing his or her own affairs.[207] Thus, the Crown was required to take reasonable steps and to exercise ordinary prudence to protect IR 201 and the First Nation's economic livelihood from being irreparably damaged. The Crown, however, asserted that it had neither the duty nor the power to act on behalf of the First Nation. With all due respect, we think the Crown is incorrect on both counts. We have already found that the Crown had a duty to act in light of its treaty obligations, the severity of the damage caused to IR 201, and the undue hardship suffered by members of the First Nation. All that remains to be determined is what reasonable steps the Crown should have taken to protect the First Nation's interests.

We have already found that the Crown had regulatory authority under the *NWPA* with respect to the dam's construction and operation. Yet the Crown did not exercise that authority. The question is why? It has been suggested by Canada that it did not intervene because studies done by the Water Resources Branch in 1959 and 1962 were equivocal, and that the dam may have been beneficial to navigation. The evidence before us suggests, however, that the conclusions in the 1962 report were based on the erroneous assumption that outflows on the Peace River would be fixed at a minimum of 10,000 cfs. By 1968, an internal memorandum of the federal government indicates that the federal Crown was clearly aware that this minimum outflow requirement was not being adhered to:

> Minimum releases from the reservoir were governed by the 1962 water license granted by the province. However, in the spring of 1968 outflows were reduced from the 10,000 c.f.s. requirement of the license to about 1000 c.f.s. Low natural runoff at this time aggravated the situation throughout the Mackenzie system.[208]

An internal memorandum to the Minister of Energy, Mines, and Resources in 1970 states that British Columbia was informed in 1962 that a licence was required under the *NWPA*, and that the Deputy Minister of Public Works considered the dam to be illegal as early as April 1967. The same memorandum acknowledges that the federal government was aware that the low water levels on the Peace River and throughout the delta were impacting negatively

207 *Fales v. Canada Permanent Trust Co.* (1976), 70 DLR (3d) 257 at 267, [1977] 2 SCR 302; applied in *Blueberry River Indian Band v. Canada [subnom. Apsassin]* (1995), 130 DLR (4th) 193 at 230 (SCC).

208 J. Austin, Deputy Minister, Energy, Mines, and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 275).

on federal interests, such as navigation, fisheries, wildlife, and, in particular, federal proprietary rights in Indian reserves:

> Damages from reduced flow downstream on riparians which included an Indian Reserve and trapping and navigation users in the Territories might have been used to make representations to British Columbia, but were not.[209]

Regarding navigation, the author expressed the opinion that:

> Public Works procrastinated over whether to invoke the Navigable Waters Protection act until it was too late to exert much influence on B.C. Hydro and Power Authority.[210]

Canada submitted that, when it became aware of the magnitude of the problems caused by the Bennett Dam on federal interests in 1970, it did take steps to address these concerns. In 1970, Prime Minister Trudeau wrote Premier Bennett requesting a meeting among the interested governments to discuss what action should be taken in light of the "increasingly severe social and environmental conditions existing in Lake Athabasca and the delta area," which impacted on federal responsibilities relating to "national parks territories, to wildlife within the parklands and to the economic conditions of Indian populations."[211] There is no evidence that Premier Bennett ever responded to this letter. A similar letter was written by the federal Minister of Fisheries and Forestries to his provincial counterpart in December 1970, requesting the province's participation in discussions to address the environmental damages caused by the dam; he even proposed the following solutions:

> Given certain precautions, especially in 1971, it is possible that a regime of discharges from the W.A.C. Bennett Dam may be preferable to the variations which were historically characteristic of the Peace River. Damaging floods will be avoided as long as there is close cooperation between the relevant authorities in B.C., Alberta and the Northwest Territories.
>
> Rock-filled dams on the outlet channels from the Peace-Athabasca Delta might have a favourable effect on the local ecology. *Another possibility is that of water releases from the W.A.C. Bennett Dam on an appropriate seasonal schedule.*

209 J. Austin, Deputy Minister, Energy, Mines, and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 277).

210 J. Austin, Deputy Minister, Energy, Mines, and Resources, to the Minister, July 17, 1970 (ICC Exhibit 1B, tab F, ICC p. 276).

211 Pierre Elliott Trudeau, Prime Minister of Canada, to W.A.C. Bennett, Prime Minister of British Columbia, August 12, 1970 (ICC Exhibit 1B, tab 12L, ICC pp. 288-90).

*Neither of these alternatives, however, can be investigated intelligently until B.C. Hydro's operating pattern of the W.A.C. Bennett Dam for power production is known with some degree of certainty.*[212]

Again, British Columbia chose not to respond to Canada's invitation to participate in any discussions. Technical discussions regarding the environmental impacts of the dam on the delta were held in 1970 by an intergovernmental task force with participants from Canada, Alberta, and Saskatchewan, who expressed "a general feeling of helplessness" over the fact that British Columbia was not involved. Attempts to engage the province in discussions to address concerns over fisheries also proved fruitless.

Although it is clear from the evidence before us that the federal Crown was aware that the Bennett Dam could have significant impacts on navigation and other federal interests, and did seek to invite the participation of the BC government and BC Hydro in discussions about the impacts, these overtures and invitations did not go far enough. The Crown had the authority, and the duty, to ensure that the approval requirements of the *NWPA* were complied with. Canada's regulatory authority under the *NWPA*, when used in conjunction with its broad jurisdiction over navigation and other federal heads of power, provided the federal Crown with a powerful basis for initiating discussions with British Columbia as to the project's potential impacts on downstream federal interests. By simply insisting that British Columbia receive authorization under the *NWPA*, or by initiating legal proceedings to ensure that it did, the federal government could have taken the first step in protecting other federal interests, which were at risk of being significantly damaged by the construction and operation of the dam. Even when the federal Crown became aware of the negative impacts on IR 201 and the economic well-being of the Indian and Métis people of the Peace-Athabasca Delta, the Crown chose not to exercise its regulatory authority under the *NWPA*.

Nor are we convinced that any of the Crown's other initiatives to mitigate the effects of the dam on the delta discharged its fiduciary obligations towards the First Nation. As a result of a task force's recommendations, a temporary rock-fill dam was constructed on the Quatre Fourches Channel in 1971, but it was removed after it contributed to severe flooding damage in 1974. Fixed crest weirs were also installed on the Rivière des Rochers in 1975 and the Revillon Coupé in 1976, but these remedial efforts were also

212 Jack Davis, Minister of Fisheries and Forestry, to Ray Williston, Minister of Lands, Forests, and Water Resources, Victoria, BC, December 9, 1970 (ICC Exhibit 1B, tab 12P, ICC p. 298). Emphasis added.

unsuccessful in restoring water levels in the delta to pre-dam conditions. Most significantly, they did not have the desired effect of recharging the elevated lakes, or perched basins.

Simply put, these efforts were too little, too late. Numerous studies have been completed since the dam's construction, including the 1996 *Northern Rivers Basin Study*, conducted jointly by Canada, Alberta, and the Northwest Territories, which emphasized the strong relationship between the regulation of water flows on the Peace River and attempts to remediate the dam's effects on the delta. The *Northern Rivers Basin Study* concluded that efforts to replenish water levels have been successful in restoring water levels on many of the lower lakes and channels, but have not flooded the perched basins. The study emphasized the need for a coordinated approach with the BC government to modify the operational regime of the dam, if future remediation attempts are to be successful. Finally, the Board stressed that "economic factors in hydroelectric production must not take precedence over environmental stability."[213]

The Crown had extraordinary power and influence over the dam. If BC Hydro did not address federal concerns or mitigate damages to the delta and IR 201, the Minister could have ordered that the dam be torn down. Although it is extremely unlikely that the Minister would have used this extraordinary remedy under such circumstances, surely it gave the Crown the power at least to compel discussions with BC Hydro to protect federal interests. We do not accept the suggestion that such discussions would have been an exercise in futility, because the scientific evidence suggests that a coordinated approach with British Columbia, BC Hydro, Canada, and Alberta could have mitigated the effects on the delta while still enabling British Columbia to meet its economic objectives. If waters were discharged at certain times of the year and in certain quantities, such a measure could have replicated the effect of the natural spring floods and regenerated the perched basins.

In the final analysis, the Crown had the regulatory authority, and the duty, to ensure that the Bennett Dam complied with the requirements of the *NWPA*. The exercise of this regulatory authority did not limit the Minister of Public Works to considering only the dam's potential impacts on navigation. The Minister had a broad discretion to consider the environmental impacts on other areas within Parliament's legislative authority, including Indians and reserve lands. If Canada had insisted that the dam be constructed and oper-

213 *Northern River Basins Study*, 8 (ICC Exhibit 3). Emphasis in original.

ated in accordance with the requirements of the *NWPA*, the technical evidence suggests that Canada could have imposed terms and conditions on the operation of the dam to ensure that its environmental impact on federal interests was minimized. One obvious measure, suggested by the Minister of Fisheries and Forestries in 1970 and by the *Northern Rivers Basin Study* in 1996, would have been to stipulate conditions for the discharge of water in certain amounts and at certain times of the year to re-create natural spring flooding conditions, which periodically recharged the perched basins before the dam's construction.

Why did the Government of Canada not exercise its regulatory authority? The First Nation's legal counsel suggested that Canada's inaction was driven by political considerations:

> It is our submission that why this died as a federal issue was for pure grounds of political expediency. The Federal Government simply did not want to challenge what in the late 1960s was a symbol of B.C.'s economic growth and power and independence, and that the W.A.C. Bennett Dam, named after the former premier there, was a project too powerful, too important to B.C. for the Federal Government to weigh into on behalf of the interests of a few fish, a few buffalo and a few Indians.[214]

Whatever the underlying reasons were for Canada's decision to take no action to protect IR 201 from substantial environmental damage, it is our view that the Crown's actions and omissions do not meet the standard of care required of a fiduciary in these circumstances. The Crown simply did not take the necessary steps that persons of ordinary prudence would in managing their own affairs. Therefore, we find that the Crown breached its fiduciary duty to the Athabasca Chipewyan First Nation by failing to take reasonable steps to prevent, to mitigate, or to seek compensation for damages caused to IR 201 and to the First Nation's livelihood.

In our view, the federal Crown had extraordinary power to impose conditions on the operation of the dam but chose not to exercise it. Although it could be said that this power was not conferred on the responsible Minister to exercise for the sole benefit of First Nations, it is reasonable to infer that, where public works substantially impact on federal interests and other matters of national concern, Parliament intended the Minister to exercise this power in a proactive manner. To suggest otherwise would be to frustrate the will of Parliament and the object and purpose of the Act.

214 ICC Transcript, September 30, 1997, p. 16 (Jerome Slavik).

This situation cried out for the Government of Canada to intervene on behalf of aboriginal people and Canadians in general, who share a profound concern over the integrity of one of the most ecologically rich and sensitive areas on the continent. The Peace-Athabasca Delta has an intrinsic value to all Canadians, and efforts should have been made to preserve the integrity of the delta while attempting to balance the need for economic development. The federal government had significant interests in maintaining the delta for the benefit of future generations. The Bennett Dam impacted on the Crown's federal responsibilities over national parks, navigation, riparian rights, the Crown's proprietary interests in Indian lands, the preservation of fish and fish-spawning areas, the maintenance of wetlands for migratory birds, and the economic well-being of hundreds of aboriginal people who relied on the Crown for the protection and preservation of their treaty rights and interest in reserve lands. By declining to take reasonable steps to prevent or to mitigate environmental damages to the delta, the Crown has forsaken the legitimate interests of all Canadians and certainly the treaty rights of the Athabasca Chipewyan First Nation.

## ISSUE 2: INTERFERENCE WITH TREATY RIGHTS

For the reasons stated above, we find that no interpretation of treaty could justify such a massive infringement on the treaty rights of a First Nation and destruction of its economic livelihood. Although the interference with treaty rights in this instance was not committed directly by the actions of the federal Crown, we find that Canada breached its fiduciary obligations towards the First Nation by failing to take reasonable steps to prevent or to mitigate the environmental damages to the delta and IR 201 specifically. In view of this finding, we decline to address the First Nation's submissions that the Crown did not meet the strict justification test set out in *Sparrow*.[215] Generally speaking, it is our view that the test in *Sparrow*, regarding what is required to justify an infringement on treaty rights, does not apply in this case because the material events took place prior to the entrenchment of existing aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*. Having said that, we have no hesitation in finding that, except to the extent that the *NRTA* extinguished the treaty right to hunt, trap, and fish for commercial purposes, the evidence before the Commission does not demonstrate a "clear and plain" intention on the part of the Crown to extinguish the First Nation's

215 *R. v. Sparrow*, (1990) 70 DLR (4th) 385 (SCC).

rights under Treaty 8 to hunt, trap, and fish for food and to use IR 201 for its exclusive use and benefit. Although the dam's impact substantially interfered with the exercise of these treaty rights and entitlements, they were never extinguished, and such existing rights are now protected by section 35(1) of the *Constitution Act, 1982*.

We also decline to consider the First Nation's argument that the provincial or federal Crown had a positive duty under the *NRTA* to secure a supply of game and fish for the Indians, since it adds little, if any, significance to the Commission's findings in this inquiry.

# PART V

## CONCLUSIONS AND RECOMMENDATION

### CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim of the Athabasca Chipewyan First Nation. To determine whether the claim discloses an outstanding lawful obligation owed by Canada to the First Nation, the Commission was called upon to address four issues. In our view, the central issue before us was whether the Crown owed a fiduciary duty to the First Nation to prevent, mitigate, or seek compensation for the infringement upon the exercise of the First Nation's treaty rights and for damages caused to IR 201 by the construction and operation of the Bennett Dam. Issues surrounding the nature and scope of treaty rights and whether the Crown owed a statutory duty to protect IR 201 from environmental damage were also addressed in the course of answering that central question.

Our findings are summarized below.

### ISSUE 1: STATUTORY AND FIDUCIARY OBLIGATIONS OF THE FEDERAL CROWN

The scope and content of the Crown's fiduciary duties can only be determined through a careful examination of the nature of the relationship between the Crown and the First Nation in question. The essential question is whether the Crown had undertaken to protect reserve land on behalf of the First Nation by statute, agreement, unilateral undertaking, or through a particular course of conduct. After careful consideration of the arguments presented by Canada and the First Nation, we find that the Crown did in fact undertake to protect the treaty rights of the Athabasca Chipewyan First Nation and its exclusive use, occupation, and enjoyment of IR 201.

The Crown's discretion and power to protect Indians in the use and occupation of their reserve lands is reflected in the *Royal Proclamation of 1763*,

section 91(24) of the *Constitution Act, 1867*, and the *Indian Act*. In addition, the evidence surrounding the negotiation of Treaty 8 and the allocation of land in the Peace-Athabasca Delta confirms that the Crown also made a specific undertaking to protect IR 201 and its rich wildlife and plant habitat for the exclusive use and benefit of the Athabasca Chipewyan First Nation.

Based on the historical evidence before us in this inquiry, we make the following conclusions regarding the nature and content of the First Nation's treaty rights. First, the Crown's objective and purpose for entering into Treaty 8 was to extinguish Indian or aboriginal title to the treaty area and to open those lands for settlement, mining, lumbering, trading, or other purposes. At the same time, the federal Crown agreed to protect the Indian economies and ways of life, which were based upon hunting, trapping, and fishing in their traditional areas. Second, the reason the First Nation adhered to Treaty 8 was to protect its rights to hunt, trap, and fish. Elders' testimony confirms that these rights were fundamental to the First Nation's culture, community, economy, and way of life. The Treaty Commissioners' strong assurances and guarantees that these rights would continue, and the promise of other benefits, were the inducements that ultimately persuaded the leaders of the day to sign the treaties. Third, IR 201 was selected by the band because of its rich environment and abundance of muskrat, game, fish, and birds. Canada set aside IR 201 for the express purpose of providing the First Nation with exclusive rights to hunt, fish, and trap over this area and to protect the First Nation's ability to continue its traditional way of life and economy. This was justified by federal officials on the grounds that IR 201 had no other commercial value. Given the Crown's particular course of conduct in setting aside IR 201 for the exclusive use and benefit of the First Nation to assist it in exercising traditional pursuits, it was reasonable for the First Nation to expect that the Crown would take reasonable steps to protect the natural resources on IR 201 to ensure that its treaty rights and entitlements had meaningful content.

In our view, no reasonable interpretation of Treaty 8 could allow either the Government of Canada or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based. Nor do we believe that a reasonable interpretation of Treaty 8 would allow any government to effectively destroy the very economies upon which the Indians' signature of Treaty 8 was premised. Even if we are incorrect in these two conclusions, it is surely clear that no reasonable interpretation of Treaty 8 would allow the substantial interference with treaty rights *on reserve land* originally set aside

by Canada specifically as an exclusive hunting, fishing, and trapping area for the use and benefit of the First Nation. Despite the Crown's undertaking to protect these lands for the exclusive use of the First Nation, the construction and operation of the Bennett Dam deprived the First Nation of the beneficial use of its treaty entitlement.

The inequity of the result is dramatic. The federal Crown's right to take up lands for settlement and other purposes has certainly been exercised in the Treaty 8 area. The First Nations have honoured their part of the treaty, and the Crown has received the benefits of that treaty in the form of lands and resources worth millions of dollars. Yet the consideration received by the First Nation under Treaty 8, namely, the right to hunt, trap, and fish and the exclusive right to the beneficial use of IR 201, has been rendered almost entirely valueless because of the ecological destruction of those lands – a consequence the Government of Canada could have prevented, but chose not to.

For the above reasons, we have no hesitation in concluding that members of the Athabasca Chipewyan First Nation suffered extreme hardship and economic loss as a result of the destruction of the delta and environmental damages to IR 201. Given the severity of the impact on this community, it is our view that members of this community were and are entitled to expect the Crown to take reasonable steps to prevent, to mitigate, or to seek full compensation for the destruction of this First Nation's economic livelihood, for damages to IR 201, and for the substantial infringement on its food harvesting rights under Treaty 8.

With respect to the question of whether Canada had unilateral power or discretion over the legal and practical interests of the First Nation, we find that the federal Crown had significant power and discretion to exercise its constitutional jurisdiction over navigation, federal proprietary interests, and Indian lands. We also find that the federal Crown had an affirmative duty to exercise its regulatory authority under the *Navigable Waters Protection Act*, and, in the course of deciding whether to approve the dam project, the Crown had the discretion to consider whether the dam's construction would impact on federal areas of interest, including the First Nation's treaty rights and interests in IR 201. To read the legislative and constitutional jurisdiction of the Crown in a more limited fashion would frustrate the purpose of the Act, which, in its essence, is and was a tool to regulate navigation and to protect riparian owners from the harmful effects of works constructed on navigable waterways. Further, the federal Crown had a fiduciary obligation,

both under treaty and under the *Indian Act*, to protect and to preserve the treaty rights, the reserve land base, and the legal and economic interests of the First Nation.

The Commission finds that the First Nation was, in fact, peculiarly vulnerable to the Crown's unilateral power and discretion to regulate the construction and operation of the Bennett Dam. The federal government was well aware of British Columbia's hydroelectric development plans on the Peace River prior to the completion of the dam, but representatives of the government of Canada and British Columbia never informed or consulted the First Nation about the fact that the Bennett Dam might significantly alter the ecology, flora, and fauna of the delta. Nor was the First Nation given an opportunity to provide input into the planning and development of the Bennett Dam to ensure that its interests and concerns were adequately addressed. The First Nation was also vulnerable to and at the mercy of the Crown's discretion or power in the sense that it was not aware of the dam and its potential impacts, and it did not have the sophistication or resources at that time to pursue the matter on its own.

Canada either knew, or ought to have known, of the impacts the dam would have on the economy and way of life of the First Nation, and this information should have been disclosed to the First Nation at the earliest possible opportunity. Canada's failure to provide timely disclosure of the dam and the impending damages to the delta amplified the effects of the First Nation's vulnerability, because the First Nation was deprived of the opportunity to make representations to BC Hydro or to seek whatever recourse was available to try to prevent or to mitigate the damages.

It was the Crown that had regulatory authority with respect to the dam's construction and operation, not the First Nation. Furthermore, the Crown had the resources and the influence to prevent, to mitigate, or to seek compensation for damages caused to IR 201. Why the Crown chose not to exercise its authority over the Bennett Dam, while members of the First Nation suffered undue hardship, is perplexing, given the nature of the Crown's fiduciary relationship with aboriginal peoples and its treaty commitments.

In view of the specific nature of the relationship between the Crown and the First Nation in this case, we find that the appropriate standard of care is based on what a person of ordinary prudence would do in managing his or her own affairs. Thus, the Crown was required to take reasonable steps and to exercise ordinary prudence to protect IR 201 and the First Nation's eco-

nomic livelihood from being irreparably damaged. In our view, the Crown failed to discharge this standard of duty in this case.

This situation cried out for the Government of Canada to intervene on behalf of aboriginal people, and Canadians in general, who share a profound concern over the integrity of one of the most ecologically rich and sensitive areas on the continent. The Peace-Athabasca Delta has an intrinsic value to all Canadians, and efforts should have been made to preserve the integrity of the delta, while attempting to balance the need for economic development. The federal government had significant interests in maintaining the delta for the benefit of future generations. The Bennett Dam impacted on the Crown's federal responsibilities over national parks, navigation, riparian rights, the Crown's proprietary interests in Indian lands, the preservation of fish and fish-spawning areas, the maintenance of wetlands for migratory birds, and the economic well-being of hundreds of aboriginal people who relied on the Crown for the protection and preservation of their treaty rights and interest in reserve lands. By declining to take reasonable steps to prevent or to mitigate environmental damages to the delta, the Crown has forsaken the legitimate interests of all Canadians and certainly the treaty rights of the Athabasca Chipewyan First Nation.

## ISSUE 2: INTERFERENCE WITH TREATY RIGHTS

For the reasons stated above, we find that no interpretation of treaty could justify such a massive infringement on the treaty rights of a First Nation and destruction of its economic livelihood. In view of this finding, we decline to address the First Nation's submissions that the Crown did not meet the strict justification test set out in *Sparrow*. Nevertheless, we find that, although the dam's impact substantially interfered with the exercise of the First Nation's treaty rights and entitlements, they were never extinguished, and such existing rights are now protected by section 35(1) of the *Constitution Act, 1982*.

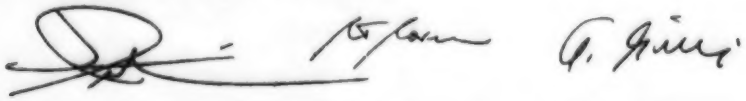
## RECOMMENDATION

Based on a thorough consideration of the facts and law in relation to this claim, we find that Canada breached its statutory and fiduciary obligations towards the Athabasca Chipewyan First Nation by failing to take reasonable steps to prevent, to mitigate, or to seek compensation for an unjustified infringement on its treaty rights and for environmental damages to IR 201 caused by the construction and operation of the W.A.C. Bennett Dam.

Accordingly, we find that Canada owes an outstanding lawful obligation to the Athabasca Chipewyan First Nation and recommend:

**That the Athabasca Chipewyan First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION



| P.E. James Prentice, QC | Carole T. Corcoran | Aurélien Gill |
|---|---|---|
| Commission Co-Chair | Commissioner | Commissioner |

Dated this 31st day of March, 1998

# APPENDIX A

## ATHABASCA CHIPEWYAN FIRST NATION INQUIRY

| | | |
|---|---|---|
| 1 | **Request that Commission conduct inquiry** | March 4, 1996 |
| 2 | **Planning conference** | May 17, 1996 |
| 3 | **Community sessions** | October 10, 1996<br>November 27, 1996 |

Two community sessions were held. At the first, held on October 10, 1996, the Commission heard from Tony Mercredi, Madeline Marcel, Victorine Mercredi, Eliza Flett, Josephine Mercredi, Daniel Marcel, Margaret Marcel, Mary Bruno, and Rene Bruno. Expert evidence was provided by the following witnesses: Wim M. Veldman and David William Schindler.

Witnesses heard at the November 27, 1996, session were Tony Mercredi, Lawrence Courtoreille, Chief Archie Cyprien, and Victorine Mercredi.

| | | |
|---|---|---|
| 4 | **Oral session** | September 30, 1997 |

5 **Content of the formal record**

The formal record for the Athabasca Chipewyan First Nation Inquiry into the W.A.C. Bennett Dam and Damage to Indian Reserve 201 consists of the following materials:

- 22 exhibits tendered during the inquiry
- written submissions from counsel for the Athabasca Chipewyan First Nation and counsel for Canada
- transcripts from community sessions and oral submissions (3 volumes)

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

# RESPONSES

Re: Fort McKay First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development, to
James Prentice and Carole Corcoran, Indian Claims Commission,
April 28, 1998
227

Re: Kawacatoose First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development, to
James Prentice and Roger Augustine, Indian Claims Commission,
April 28, 1998
228

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

APR 2 8 1998

Commissioner James Prentice, Q.C.
Commissioner Carole Corcoran
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

I am pleased to inform you that Canada has now finalized its position with respect to the Indian Claims Commission (ICC) Inquiry and Report into the Fort McKay First Nation's Treaty Land Entitlement (TLE) Specific Claim.

As you are aware, Canada has been conducting a TLE Policy review since the release of the Fort McKay Report in December 1995. As a result of our review, Canada has adopted the ICC's recommendation that Canada accept the Fort McKay First Nation's claim for negotiation.

Thank you for your reports on TLE, which assisted Canada during the TLE Policy review and permitted Canada to reconsider its position on TLE validation criteria.

Yours sincerely,

Jane Stewart

Jane Stewart, P.C., M.P.

c.c.: Chief Jim Boucher

Canada

Minister of Indian Affairs and Northern Development

Ministre des Affaires indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

OCT 2 8 1998

Commissioner James Prentice, Q.C.
Commissioner Roger Augustine
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

I am pleased to inform you that Canada has now finalized its position with respect to the Indian Claims Commission (ICC) Inquiry and Report into the Kawacatoose First Nation's Treaty Land Entitlement (TLE) Specific Claim of March 1996.

As you are aware, Canada has been conducting a TLE Policy review since the release of the Fort McKay Report in December 1995 and the Kawacatoose Report in 1996. As a result of our review, Canada has adopted the ICC's recommendation that Canada accept the Kawacatoose First Nation's claim for negotiation, under the Specific Claims Policy.

Thank you for your reports on TLE, which assisted Canada during the TLE Policy review and permitted Canada to reconsider its position on TLE validation.

Yours sincerely,

Jane Stewart

Jane Stewart, P.C., M.P.

c.c.: Chief Richard Poorman

Canada

## THE COMMISSIONERS

**Roger J. Augustine** is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was president of the Union of NB-PEI First Nations from 1988 to January 1994. He is president of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products. He has been honoured for his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr Augustine was appointed a director to the National Aboriginal Economic Development Board. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed a Commissioner of the Indian Claims Commission in 1992.

**Daniel J. Bellegarde, Co-Chair**, is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected First Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is now a management and governance consultant. Mr Bellegarde was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1991, and April 19, 1994, respectively.

**Carole T. Corcoran** is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed a Commissioner of the Indian Claims Commission in July 1991.

**P.E. James Prentice, QC, Co-Chair**, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1991. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.